IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1452

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., NATIONAL FREIGHT CLAIM COUNCIL OF AMERICAN TRUCKING ASSOCIATIONS, INC.,
Petitioners,

v.

THE INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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March 19, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Petitioners request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on December 20, 1978.

CITATIONS TO THE OPINIONS BELOW

The December 20, 1978, decision of the Court of Appeals is set forth in Appendix A, but it is not yet reported. The March 31, 1977, Report and Order of the Interstate Commerce Commission in Docket No. 35944, *Drug and Toilet Prep. Traffic Conf.—Petition,*

which the Court of Appeals affirmed is set forth in Appendix B and is reported at 353 I.C.C. 536 (1977). The prior report and order of the Commission served July 16, 1976, is set forth in Appendix C and is reported at 353 I.C.C. 143.

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1978. This Court has jurisdiction pursuant to 28 U.S.C. § 2350(a).

QUESTION PRESENTED

Is the "rational basis" test the correct standard of judicial review of an Interstate Commerce Commission interpretation of the proper measure of damages for loss or injury to shipments moving in interstate commerce when that agency has no jurisdiction to award damages under Section 11707 of the Interstate Commerce Act?

STATUTORY PROVISIONS

The statutory provisions are set forth in Appendix D. They are:

49 U.S.C. § 10730.

49 U.S.C. § 11707.

STATEMENT OF FACTS

The Interstate Commerce Act makes a motor carrier transporting property in interstate commerce liable for the actual value of goods, the loss or injury of which is caused by the carrier, and the carrier may not limit the amount of its liability by contract or otherwise. 49 U.S.C. § 11707 [formerly 49 U.S.C. § 20 (11)]. However, a statutory exception to this general

prohibition permits the carrier to publish with Interstate Commerce Commission approval so-called released value rates. Under such rates the carrier offers to transport goods for a reduced amount in consideration for the right to limit its liability to a specific lesser declared value of the goods shipped. 49 U.S.C. § 10730 [formerly 49 U.S.C. § 20(11)]. In order to accept the carrier's offer of a reduced rate the shipper must notify the carrier in writing that it agrees to the specific lesser declared value set forth in the carrier's tariff rather than actual value. If loss or injury to the shipment occurs, the carrier's liability is thus limited to the specific declared value set forth in the tariff and not the higher actual value of the goods shipped.

The entire general commodity motor common carrier industry (some 4,000 carriers) maintains a common tariff specifying the declared value of numerous commodities such as drugs, chemicals, medicines, toilet articles and the like when they are shipped under released rates. The tariff is published by their agent, the National Motor Freight Traffic Association, Inc. Well over a million shipments move under the applicable tariff each year. The specific tariff limiting carrier liability to a declared value is found in Item 60000 of the National Motor Freight Classification. It reads as follows:

> Drugs, Chemicals, Medicines, Toilet Preparations and other Articles Named in items making reference to this item, value declared in writing by the shipper, or agreed upon in writing as the released value of the property, not exceeding 50 cents per pound, see Notes, items 60002 and 60004.

As noted, Section 10730 of the Interstate Commerce Act specifically requires that the shipper must agree in

writing to the carrier's lesser declared value in order to take advantage of reduced released value rates. Hence, Item 60000 refers to two note provisions in the same tariff which describe the manner in which shippers take advantage of the reduced rates. One note, Item 60002, sets forth the written notice shippers must give the carrier if they want to contract to ship their goods at a declared value not exceeding 50 cents per pound. Item 60002 reads as follows:

> NOTE—The value declared in writing by the shipper or agreed upon in writing as the released value of the property, as the case may be, must be entered on shipping order and bill of lading as follows:
>
> The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding 50 cents per pound for each article.

The second note, Item 60004, provides that if the shipper does not give written notice in accordance with Item 60002, the declared value "not exceeding 50 cents per pound" in Item 60000 will not apply, and the shipper will not receive reduced rates. Item 60004 reads as follows:

> NOTE—Classes named in item 60000 will not apply if consignor fails or declines to declare value or agree to release value in writing in accordance with Note, item 60002, or if same or lower charges would result from the application of provisions in individual descriptions for articles.

In Released Rates Order MC-342, entered on August 13, 1952, the Commission approved the tariffs now set forth in Items 60000, 60002 and 60004. Since 1952, the predominant practice among motor carriers when measuring their liability for loss or damage under 49

U.S.C. § 11707 has been to apply Item 60000 by multiplying the weight of the commodity lost, or portion thereof lost, by 50 cents per pound and pay shippers' claims accordingly. For example, if a one thousand pound shipment of drugs with an actual value of $1.00 per pound is tendered at reduced released value rates and the entire shipment is lost, the carrier would pay the shipper's claim for $500, i.e., 1,000 pounds of drugs multiplied by 50 cents. If a shipper tendered to a carrier an identical 1,000 pound shipment of drugs with an actual value of $1.00 per pound and 500 pounds were delivered but 500 pounds were lost, the carrier would pay a claim for $250, i.e., the 500 pounds of drugs actually lost multiplied by 50 cents.

Division 2 of the Interstate Commerce Commission has made findings in a declaratory order which are contrary to this 25 year practice. The Commission has stated that in its opinion ". . . in the event of loss or damage to a portion of the shipment the amount recoverable should be the released value of 50 cents per pound multiplied by the *gross* shipping weight of each commodity involved . . . ." (emphasis added). Thus, in the example above, in the Commission's view, when the partial loss of 500 pounds of drugs occurs, the amount recoverable is not $250, the weight of the portion of the drugs actually lost multiplied by 50 cents. Division 2 of the Commission advises the amount recoverable should be $500 (the actual value of the drugs lost in the example above) as determined by multiplying the 1,000 pound gross shipping weight by 50 cents. The sole basis for this conclusion is the use of the phrase "for each article" placed on the bill of lading by the shipper to notify the carrier that the shipper agrees that the value of the goods shipped is the de-

clared value in Item 60000, namely "50 cents per pound." Previously, in the same proceeding the same Division 2 of the Commission composed of different Commissioners advised that the carriers' longstanding method of calculating damages was correct. See Appendix C.

The Commission's finding results in the anomalous situation where the carrier's liability is the same whether it loses part of a shipment or an entire shipment. Depending upon the value of the shipment, the carrier is liable for the actual value of the goods shipped rather than the lower declared value despite the fact the shipper received reduced shipping rates.

On review, the United States Court of Appeals for the District of Columbia Circuit found that while a number of substantial arguments were advanced by the motor carrier industry against the Commission interpretation, the Court could not find the Commission view lacked a "rational basis." Accordingly, it affirmed.

REASONS FOR GRANTING THE WRIT

I

The Lower Court Improperly Applied The Rational Basis Test When Reviewing The Agency Findings

The findings in the declaratory order of the Commission are not "legislative rulings;" rather, they are "interpretative guidelines." The scope of judicial review of agency interpretative guidelines is discussed in *Administrative Law Treatise,* Kenneth Culp Davis, 1978 Supplement, at pages 257-258:

> The distinction between legislative rules and interpretative rules is fundamental. It clearly continues, even though some courts carelessly disregard it. When Congress has not delegated to an agency the power to make law through rules, the agency may make statements to guide its staff and to guide affected parties, but what the agency says is not binding on courts.

In *General Electric Co.* v. *Gilbert,* 479 U.S. 125 (1976), this Court noted the different roles judicial review plays depending upon whether the Court is reviewing an interpretative guideline or a legislative rule. The proper role for judicial review of interpretative guidelines is set forth in the *General Electric* case, *supra,* at 141, wherein this Court adopts the doctrine established in *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944):

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

The distinction between interpretative rules and legislative rules is also made clear in *Batterton* v. *Francis,* 432 U.S. 416 (1977), where this Court stated that when rulings have legislative effect, they are entitled to more than the mere deference or weight given interpretative rulings. 432 U.S. at 426.

In this proceeding there can be no doubt the Court of Appeals applied a judicial review standard applica-

ble to legislative rulings. In affirming the Commission's findings the Court of Appeals stated:

> In general, the "arbitrary and capricious" standard requires a reviewing court to defer to an agency's judgment so long as it has a rational basis. (Slip Opinion, p. 6).

For authority on this point the Court cites its own opinion in *Ethyl Corp.* v. *EPA,* 541 F.2d 1, at 34-35 (D.C.C.A. 1976), *cert. den.* 426 U.S 941 (1976). In the *Ethyl* case the agency was engaging in legislative rulemaking delegated to it by statute. 541 F.2d at 34-35. Clearly, then, the Court below looked to the test applicable to review of legislative rules rather than interpretative rules.

Nor can there be any doubt the Commission's interpretation is only a guideline. The Commission's own order merely terminates the proceeding; it does not order any affected party to abide by the Commission's interpretation. Indeed, the Commission itself holds that it has no jurisdiction to adjudicate loss and damage claims arising under 49 U.S.C. § 11707; nor can it order motor carriers to pay damages pursuant to claims filed under 49 U.S.C. § 11702. *Overcharges Dup. Payment of Overcollection Claims,* 358 I.C.C. 114, 115 (1978); *Herrera* v. *Greyhound Lines, Inc.,* 121 M.C.C. 73, 77-78 (1975). By statute, Congress has delegated that authority exclusively to the courts, 49 U.S.C. § 11707(d). See also *Norris* v. *Clayman,* 46 M.C.C. 371, 375 (1946); *Loss & Damage Claims,* 340 I.C.C. 515, 539 (1972). It is this lack of delegation of jurisdiction to award damages that marks the Commission's finding as an interpretative guideline, and the fact that the interpretation relates to a tariff on file with that agency only goes to the amount of deference to be given the

Commission interpretation under the *Skidmore* doctrine.

Courts alone have jurisdiction to adjudicate loss and damage claims and they routinely perform this function. In doing so courts are free to interpret tariffs, for tariffs on file with the Commission are treated as statutes. *Pennsylvania R. Co.* v. *International Coal Min. Co.,* 230 U.S. 184, 197 (1913); *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.,* 306 U.S 516, 520 (1939), Reh. den., 307 U.S. 649 (1939); *Updike Grain Co.* v. *Chicago & N.W. Ry. Co.,* 35 F.2d 486 (8th Cir. 1929); *Pillsbury Flour Mills Co.* v. *Great Northern Ry. Co.,* 25 F.2d 66, 67-69 (8th Cir. 1928). Of particular significance is this Court's interpretation of the language determining the declared value of goods shipped in interstate commerce in *Western Transit Co.* v. *Leslie & Co.,* 242 U.S. 448 (1917). In the *Western* case, the shipper tendered a 25 ton shipment of copper. During transit about one ton was stolen due to the fault of the carrier. The traffic moved under a released rate where the declared value was not to exceed $100 per net ton. Speaking for the unanimous Court, Justice Brandeis stated:

> The "released" or agreed valuation is "$100 per net ton." There were 25 tons in this shipment. It is insisted that, as the 25 tons constituted a single lot, $2,500 is recoverable for loss of or damage to the whole or to any part of the lot. This construction does violence to the language used and is unreasonable. The valuation clause fixes not an arbitrary limit of recovery, but a ratio. 242 U.S. at 454.

The language determining the declared value in Item 60000, "50 cents per pound," parallels the language the Court interpreted in the *Western* case, "$100 per net

ton." Nevertheless, the Commission would find that Item 60000 provides that the amount recoverable in case of partial loss is 50 cents multiplied by the gross shipping weight, thereby creating an arbitrary limit of recovery and not a ratio in direct conflict with this Court's precedent. In reviewing this at best tenuous and unique Commission conclusion, the Court below should have followed the doctrine of review established by *Skidmore* and not the rational basis test of the Court of Appeals for the District of Columbia Circuit cited in *Ethyl*. This error has substantial impact for the reasons discussed below.

II

Application Of The Erroneous Standard Of Review Has A Substantial Impact

The lower Court's error in applying an improper standard of review will have substantial impact on the motor common carrier industry and the judicial system. In order to conserve judicial energies and terminate an ongoing nationwide controversy, this Court should grant a writ of certiorari.

The issue presented here affects motor carriers and shippers on a nationwide basis. Thousands upon thousands of claims for loss or damage arise under 49 U.S.C. § 11707 in virtually every state of the Union each year, and an industry-wide practice of dealing with those claims is being disrupted. The amount of money involved in those claims collectively exceeds millions of dollars. Four thousand motor carriers are party to tariff Item 60000 and thousands of shippers agree to ship at the declared value contained in that tariff item. Petitioners also point out that 49 U.S.C. § 11707 has no threshhold jurisdictional amount and any claim can be prosecuted in the federal district courts. To date,

approximately 238 motor carriers have been sued in three class actions in three different federal district courts. Civil Action No. 77C-3965, *American Home Products Corporation, et al.* v. *A. & H. Truck Line, Inc., et al.*, (United States District Court for the Northern District of Illinois, Eastern Division); Civil Action No. 77-5767, *American Home Products Corporation, et al.* v. *AAA Trucking Corporation,* (United States District Court for the Southern District of New York); Civil Action No. 77-4630, *American Home Products Corporation, et al.* v. *Ameri-Con Cartage, et al.,* (United States District Court for the Central District of California). Consolidation of the suits already has been presented to the Panel on Multidistrict Litigation and that Panel has found that the various cases pending at that time should not be joined. *In Re American Home Products Corp. "Released Value" Claims Litigation,* 448 F. Supp. 276 (1978). The Commission's interpretative ruling can reasonably be expected to prompt even more litigation, particularly since only courts have jurisdiction to award damages under 49 U.S.C. § 11707, and the Commission's guideline is not binding on the courts or on any affected person.

III

Application Of The Proper Standard Of Review Warrants A Different Result

Not only has an improper standard of review been applied but equally important is the fact that application of the proper standard warrants a different result. The Commission decision conflicts with the ratio method of determining shipment damages established by this Court in the *Western* case, *supra*. This conflict

cannot be sustained when the Commission decision is reviewed as a guideline rather than as a legislative rule. The Commission itself admits the words found in Item 60000, namely, "not exceeding 50 cents per pound" limit the carriers' liability to 50 cents multiplied by t' e weight actually lost in case of partial loss. The Commission, however, nullifies the plain and undisputed meaning of the language of Item 60000 solely because the notation placed on the bill of lading pursuant to Item 60002 contains the phrase "for each article." Aside from the fact a notation on a bill of lading, even a notation placed at the carrier's instructions, cannot discharge an obligation created by a tariff, the Commission finding has two fatal defects. First, the Commission gives no reason why the language used to trigger Item 60000 changes the plain meaning of Item 60000. The purpose of Item 60002 is merely to notify the carrier in writing, as required by statute, that the shipper agrees to ship its goods at the lesser declared value so the carrier can apply a reduced rate. Item 60002 is not intended, nor does it, in fact, set forth the declared value of the goods shipped. That function is the sole purpose of Item 60000. Therefore, when reviewed according to the *Skidmore* doctrine, the Commission's finding that language used in notification Item 60002 changes the plain meaning of Item 60000 is unpersuasive.

The second defect in the Commission's finding lies in its failure to give any positive reason why the phrase "for each article" contained in Item 60002 means that damages must be measured by gross shipping weight. The Commission states that the phrase "for each article" in the notification item must be given some meaning and that it is not precluded from attributing to the phrase the meaning it did. Such negative reasoning

is entitled to little, if any, deference. The Commission must set forth a positive reason for its finding. This is particularly true when the meaning given by the Commission conflicts with the recognized principles established in *Western, supra,* that damages for partial loss or damage to released value shipments are measured according to a ratio and not according to gross shipment weight. Since application of the proper standard of review would warrant a different result, the granting of this writ of certiorari would be of affirmative significance.

PRAYER

Issuance of a declaratory order by an administrative agency should terminate controversy. 5 U.S. C. § 554 (e). When an agency's interpretative guideline is reviewed under an improper standard, the very opposite result occurs. This frustration of purpose has a substantial impact upon thousands of carriers and shippers alike and even on the federal district courts. Petitioners submit, therefore, that this proceeding presents important and special questions meriting review by this Court.

Respectfully submitted,

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March 19, 1979

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1484

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., ET AL., PETITIONERS

v.

THE INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

SOUTHERN MOTOR CARRIERS RATE CONFERENCE
DRUG & TOILET PREPARATION TRAFFIC CONFERENCE, INTERVENORS

Petition for Review of an order of the Interstate Commerce Commission

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Argued November 1, 1978

Decided December 20, 1978

Thomas M. Auchincloss, Jr., with whom *Bryce Rea, Jr.* and *Jeffrey Kohlman* were on the brief, for petitioners.

John J. McCarthy, Jr., Attorney, Interstate Commerce Commission, with whom *Mark L. Evans*, General Counsel, *Frederick W. Read, III*, Associate General Counsel, Interstate Commerce Commission, *Robert B. Nicholson* and *Frederic Freilicher*, Attorney, Department of Justice were on the brief, for respondent.

Daniel J. Sweeney, with whom *John M. Cutler, Jr.*, was on the brief, for intervenor, Drug & Toilet Preparation Traffic Conference.

Also *R. Craig Lawrence*, Attorney, Interstate Commerce Commission entered an appearance for appellee, Interstate Commerce Commission.

Before: LUMBARD,* *Senior Circuit Judge*, United States Court of Appeals for the Second Circuit, and TAMM † and LEVENTHAL, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.

LEVENTHAL, *Circuit Judge*: Petitioners, associations representing motor carriers of freight, seek review of the construction by the Interstate Commerce Commission (ICC) of an unusual liability limitation provision contained in the carriers' tariffs. Finding the ICC's decision neither arbitrary nor capricious, we affirm.

A. *Background*

Section 20(11) of the Interstate Commerce Act [1] embodies the common law principle prohibiting limitations by common carriers of their liability for loss or damage to freight caused by them during shipment. The

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

† Circuit Judge TAMM did not participate in the decision of this case.

[1] 49 U.S.C. § 20(11) (1970). Section § 20(11) applies to motor carriers under § 219 of the Act, 49 U.S.C. § 319 (1970).

section does contain an exception permitting carriers to limit their liability to a declared or agreed value ("released value") of the goods being transported. In order to take advantage of this option, carriers must make available to shippers two rate schedules—one for shipment where the carrier assumes full liability, and one containing lower rates for shipments under the released value provision. ICC approval must be obtained before a released value provision may be employed.[2]

On June 9, 1952, motor carrier representatives applied to the ICC for authority to adopt a released value applicable to the transportation of drugs, medicines, toiletries and other products. Their released value provision read:

> The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding 50 cents per pound for each article.

In its released Rate Order No. MC-342 of August 13, 1952, the Commission granted the carriers the requested authority.

This released value provision, which was incorporated into the carriers' National Motor Freight Classification,[3]

[2] 49 U.S.C. § 20(11) (1970). The liability provision of § 20(11) has recently been revised and codified, without substantive change, and enacted as 49 U.S.C. § 11707(a), by P.L. 95-473, 92 Stat. 1337 (1978). The released value provision has been codified as 49 U.S.C. § 10730. For convenience, discussion in the text reflects the language of the old provisions, with cross-references to the new statute provided in the notes where appropriate. *See* P.L. 95-473, § 3(b) (reference to old provision of Interstate Commerce Act deemed a reference to corresponding provision in codification).

[3] The National Motor Freight Classification establishes ratings for various classes of commodities based on their unreleased values, as well as other factors. These ratings form the basis of the rates charged for shipment of the com-

is apparently unique, at least in tariffs subject to the ICC's jurisdiction. In case of total loss, a shipper may recover from the carrier only 50 cents times the number of pounds in the shipment. The problem arises where only partial loss or damage has occurred. Three theories have been advanced as to the meaning of "article" for purpose of determining a carrier's liability limit in this circumstance: A) "article" means each commodity in a shipment; B) "article" means the shipping container; C) "article" means the smallest identifiable unit.

As an example, take a 1000 pound shipment of drugs, total actual value $2000.00, consisting of 20 cases containing 10 bottles, each bottle weighing five pounds and having an actual value of $10.00. Assume five bottles from one case are lost.

Under Theory A, "article" means "commodity," and the carrier's liability is measured not by the number of pounds of the given commodity that are actually lost or damaged, but by the total number of pounds of the commodity in the shipment. Here, the liability limitation applicable to the entire shipment is $500.00 (50 cents times 1000 pounds). Since the shipper can recover the actual value of the goods lost or damaged up to the liability limitation, he would recover the full $50.00 actual value of the five lost bottles.

Under Theory B, "article" means "shipping container." As with Theory A, the carrier's liability is not measured by the number of pounds actually lost or damaged; here, the reference point is the number of pounds of the commodity in each shipping container in which some goods are lost or damaged. Applying Theory B to the example, the shipper's recovery would be only $25.00 (50 cents times the 50-pound weight of the case that contained the lost goods).

modity. A separate rating applies to commodities shipped under the released value provision approved in Released Rate Order No. MC-342. *See* J.A. at 41-82 (statement of Frank T. Grice).

Finally, under Theory C, "article" means the smallest identifiable unit, and the carrier's liability is measured by the number of pounds actually lost or damaged. Under this theory, the shipper in the example may recover only $12.50 (50 cents times 25 pounds, the weight of the bottles that were actually lost).

Theory A, which establishes the highest limit, is the view advanced by the shippers. Theory C, which sets the lowest limit, is advanced by the carriers. Both groups object to Theory B.

On December 20, 1973, a petition seeking a declaratory order or interpretation of the provision was filed with the ICC by Intervenor Drug and Toilet Preparation Traffic Conference. That Conference is an association of shippers consisting of the preponderance of drug, medicine, and toiletry manufacturers in the United States. It noted that much of the traffic shipped by its members moves under released value rates, and asserted that the released value provision was ambiguous and that carriers had processed claims for lost or damaged goods under each of the three theories.

There ensued extensive administrative proceedings in which each theory prevailed at one time or another.[4]

[4] By order of May 7, 1974, the Commission instituted a proceeding to examine the question. J.A. at 20. The Administrative Law Judge's initial decision of December 12, 1974, concluded that Theory C was the correct interpretation. J.A. at 294-329. Exceptions were taken by the Drug and Toilet Preparation Traffic Conference and, on July 3, 1975, ICC Review Board No. 4 decided that the correct interpretation was Theory B. J.A. at 330-372. Both the Drug Conference and the carriers' representatives sought review of that determination, and, on July 12, 1976, Division 2 of the Commis-

The Commission's final order of March 21, 1977 [5] concluded that Theory A was the correct interpretation. It ruled:

> That in the event of loss or damage to a portion of the shipment, the amount recoverable should be the released value of 50 cents per pound multiplied by the gross shipping weight of each commodity involved, but not more than the loss or damage actually sustained.[6]

The carriers seek review.

B. *Analysis*

In general, the "arbitrary and capricious" standard requires a reviewing court to defer to an agency's judgment so long as it has a rational basis.[7] We accord particular deference when, as here, the subject of review is the agency's interpretation or clarification of its own order.[8] While petitioners advance a number of substantial arguments, we cannot say the ICC's action here lacked rational basis.

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sion, acting as an appellate division, held that the initial decision of the ALJ, adopting Theory C, was correct. J.A. at 374-89. Following the Drug Conference's petition for reconsideration, Division 2, on March 21, 1977, reversed its earlier decision and entered the order adopting Theory A that is now the subject of review.

[5] No. 35944, *Drug and Toilet Preparation Traffic Conference —Petition for Declaratory Order—Liability Limitation*, 353 I.C.C. 536 (1977).

[6] *Id.* at 547.

[7] 5 U.S.C. § 706(2)(A) (1976); Ethyl Corp. v. EPA, 176 U.S.App.D.C. 373, 406-07 & n.74, 541 F.2d 1, 34-35 & n.74, *cert. denied*, 426 U.S. 941 (1976).

[8] Udall v. Tallman, 380 U.S. 1, 16 (1965); Chesapeake & O. Ry. Co. v. United States, 187 U.S.App.D.C. 241, 571 F.2d 1190 (1977).

Petitioners do not challenge the Commission's finding that the released value provision contained an inherent ambiguity that led to divergent application by carriers. In resolving the ambiguity, the Commission took into account a number of considerations.[9] The key factor was the language of the carriers' initial 1952 application, which was incorporated into Released Rate Order No. MC-342. The Commission read the term "article," as it was employed in the application, to connote "commodity." Specifically, the Commission pointed to the application's request for authority to publish agreed valuations on "articles named below" and its listing under the heading "articles" of more than 100 separate classifications of commodities that would be subject to the proposed liability limitation.[10] The initial application and order were certainly appropriate sources of guidance to the meaning of "article" in this particular provision. They put a cast on the problem of interpretation that

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[9] In adopting a construction of the word "article" as used in our 1952 order in No. MC-342 and in related items of the National Motor Freight Classification, we have given consideration to the circumstances surrounding the transportation of the property involved, including the context in which the word was used in the application to which the order responds, the language used in the exceptions and commodity tariffs naming released rates on the same list of commodities, and the possible impact of such a construction upon the carriers and members of the shipping public. We are also mindful of the well-established rule that all tariffs are to be construed according to *their* language; that the intention of the framers, although important, is not necessarily controlling; that their terms should be so clearly stated as to avoid misrepresentation or misunderstanding; and that in the case of ambiguity they must be construed against the maker.

353 I.C.C. at 540 (emphasis in original).

[10] *Id.* at 551-55.

supports the Commission's ruling as rational, even though at first blush the Commission's construction of "article" to mean "commodity" might seem to strain the normal meaning of "article."

Petitioners' principal contention is that an established principle of law requires that carriers' liability for partial loss or damage under a released value provision be determined only by reference to the smallest unit actually damaged, and not by reference to the whole shipment. Petitioners do not expressly argue that § 20(11) establishes the principle.[11] We agree with the Commission's conclusion that, despite carriers' traditional preference for liability limitations based on the smallest identifiable unit, § 20(11) does not prescribe the specific methodology by which a liability limitation must be calculated. Instead, the Commission has discretion under § 20(11) to authorize any form of released value provision, so long as it finds the rates that are based on that provision to be "just and reasonable under the circumstances and conditions surrounding the transportation." [12]

Petitioners cite various precedents as establishing the principle of law they advocate. A number of these cases [13]

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[11] Section 20(11), in pertinent part, authorizes the Commission, upon application by carriers, to

> maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released.

49 U.S.C. § 20(11) (1970), *revised and recodified as* 49 U.S.C. § 10730.

[12] *Id. See* 353 I.C.C. at 540.

[13] *E.g.*, American Railway Express Co. v. Lindenburg, 260 U.S. 584 (1923); Kansas City Southern Ry. Co. v. Carl, 227 U.S. 639 (1913); Hart v. Pennsylvania R. Co., 112 U.S. 331 (1884); Sommer Corp. v. Panama Canal Co., 475 F.2d 292 (5th Cir. 1973); Gellert v. United States, 474 F.2d 77 (10th Cir. 1973).

stand only for the proposition that a shipper who agrees to a released value in exchange for a reduced rate is estopped from denying the effectiveness of the liability limitation and claiming the full unreleased value of lost or damaged goods. The concern for fairness to carriers that underlies those opinions does not dictate that any particular interpretation of a given released value provision must control.

Western Transit Co. v. A. C. Leslie & Co., 242 U.S. 448 (1917), is more on point. The Supreme Court rejected an argument that the limit of a carrier's liability under a released value provision of "$100 per net ton" was determined by the weight of the whole shipment of 25 tons ($2500) rather than the one ton actually lost ($100). The Court said, "This construction does violence to the language used and is unreasonable. The valuation clause fixes not an arbitrary limit of recovery but a ratio." *Id.* at 454. *Western Transit* must be read in the light of the limitation provision there involved—one with no language even arguably pointing to a whole shipment standard. Here, there was the additional element of the phrase "for each article." The Commission was therefore presented with a question of interpretation not raised by the less ambiguous terms of the *Western Transit* provision.

Much of petitioners' argument is directed at the Commission's assertedly erroneous application of the principles of construction that govern the interpretation of ordinary contracts. To be sure, the released value provision resembles a contract—it is phrased in terms of an agreement, and consideration is present in the form of a reduced rate for the transportation of goods in exchange

for a limit on potential recovery in the event of loss or damage. But the existence of a "bargain" does not dictate the means by which the terms of the bargain are to be interpreted. The court accords some deference to an agency with special cognizance over a regulated industry even when the issue is one of interpretation of a contract reached by the parties and agency involvement is limited to acceptance of a filing.[14] The deference must be even greater where, as here, the pertinent language, though initiated by the carriers' filing, is incorporated into a Commission order. For such a "bargain," it is appropriate for the Commission to apply its informed judgment based on its appraisal of the interests that underlie the formulation of transportation policy.

Petitioners assail the Commission's invocation of the conventional contract doctrine that uncertainties are to be construed against the maker (in this case, the carrier),[15] claiming that the doctrine does not apply where the interpretation that results is contrary to the ordinary meaning of a term. In a similar vein, petitioners say that the Commission's consideration of the current impact on shippers,[16] whose products have significantly increased in value yet remain subject to the released value provision established in 1952, violates a principal that the quality of consideration is not to be considered in interpreting a contract. While these principles are not without relevance, the Commission's decision need not rest merely on contract doctrine, but may be rooted in sound transportation policy. In our view the Commission did not act arbitrarily in choosing to construe

[14] *See* New England Power Co. v. FERC, 187 U.S.App.D.C. 264, 270 & n.23, 571 F.2d 1213, 1219 & n.23 (1977), and cases cited therein.

[15] *See* 353 I.C.C. at 540, *quoted in* note 9 *supra*.

[16] *Id.* at 542, 546.

the terms of the released value provision against the carriers that advanced it. Nor was the agency barred from considering the position of shippers today to be relevant in interpreting the provision.

Petitioners also allege that the Commission's holding will foster unjust discrimination among shippers because it permits potential recovery for loss to vary according to the volume of goods shipped. The Commission concluded that this was not discrimination of the sort condemned by the Interstate Commerce Act,[17] and we do not disturb that ruling. It is congruent with the ICC's past approval of released value provisions that measured liability by reference to the shipping package,[18] for such provisions also permit, though to a lesser degree, variation in potential liability on the basis of volume of shipment, and depart from the concept of the smallest identifiable unit actually damaged. The Commission possesses broad discretion to determine claims of unjust discrimination.[19] We cannot say that this discretion was abused.

We are sensitive to the nagging concerns of unfairness that seem to underpin petitioners' position. They presented at the administrative proceedings numerous statements by carrier claim representatives purporting to show that it was the practice of the preponderance of motor carriers to process claims for partial loss or damage according to Theory C.[20] The carriers may well

[17] 353 I.C.C. at 546-47. *See* Interstate Commerce Act, §§ 2, 216(d), 49 U.S.C. §§ 2, 316(d) (1970), *revised and codified as* 49 U.S.C. § 10741.

[18] *E.g., Metals or Metal Alloys*, 311 I.C.C. 617, 618 (1960).

[19] *See* Nashville, C. & St. L. Ry. v. Tennessee, 262 U.S. 318, 322 (1923); City of Galveston v. United States, 257 F.Supp. 243, 246 (S.D. Tex. 1966), *aff'd*, 386 U.S. 269 (1967).

[20] J.A. at 93-221. The Commission did not give great weight to the carriers' presentation, asserting that "no supporting

feel that the Commission's decision deprives them of the benefit of a bargain they thought they had struck in 1952. Yet, the Commission has interpretative discretion.

However, nothing precludes the carriers from seeking modification of the released value provision or an increase of the rates under the existing provision, to reflect the additional costs imposed on the carriers by the Commission's decision.[21]

Petitioners assert that hardship may result from retroactive application of the order, pointing to three class actions[22] filed by shippers seeking recovery of the difference between claims previously paid under Theory C and amounts that should have been paid under the Theory A standard established by the Commission's order. While the question of retroactive applicability may deserve further study by the Commission, it was not before the Commission in this proceeding, and we do not address it.

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evidence" for the proposition was presented. The Commission added, "On the other hand, [the Drug Conference] established by competent evidence that some [carriers] settle claims for partial loss or damage on the basis of the total weight shipped times the unit valuation." It also emphasized the absence of probable adverse impact on the carriers from its ruling: "The fact that those [carriers settling claims on a per shipment basis] are able to honor claims on a basis favorable to shippers without noticeable financial impact demonstrates that other carriers should be able to pursue the same policy with respect to the commodities at issue without any fear of financial jeopardy." 353 I.C.C. at 546.

[21] The Commission's observation that adopting Theory A would not work a financial hardship on the carriers, *see* note 20 *supra*, may reflect a conclusion that present rates under the released value provision are adequate. However, the adequacy of the present rate structure was not directly before the Commission in this proceeding and a fresh look may be justified.

[22] *See* Brief for Petitioners at 12 & n.4.

C. *Conclusion*

We have recently had occasion to remark in a similar context that "[o]ur task is not the same as that of a court that construes a contract between parties, with freedom to decide for itself what is the proper construction without any deference to other sources. Here the pertinent doctrine bids us sustain the agency's interpretation of its own order unless it is arbitrary or capricious." [23] This precept has guided us in the instant case. We have found no basis on which to disturb the Commission's decision. Accordingly, its order is

Affirmed.

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[23] Chesapeake & O. Ry. Co. v. United States, 187 U.S.App. D.C. 241, 245, 571 F.2d 1190, 1194 (1977).

APPENDIX B

INTERSTATE COMMERCE COMMISSION

No. 35944

Drug and Toilet Preparation Traffic Conference—Petition for Declaratory Order—Liability Limitation

Decided March 21, 1977

Declaratory order entered determining the meaning of the liability limitation of "50 cents per pound for each article" which is published in the National Motor Freight Classification in connection with released value ratings on drugs, chemicals, medicines, toilet preparations, or other related articles. Prior report modified. Proceeding discontinued.

Appearances as shown in prior report.

REPORT AND ORDER OF THE COMMISSION ON FURTHER RECONSIDERATION

DIVISION 2, ACTING AS AN APPELLATIVE DIVISION, COMMISSIONERS HARDIN, O'NEAL, AND CHRISTIAN

BY THE DIVISION:

In the prior report entered July 12, 1976, division 2 modified the decision of Review Board Number 4, interpreting the liability limitation of "50 cents per pound for each article" as published in the National Motor Freight Classification in connection with released ratings on drugs and related commodities, pursuant to authority granted in Released Rates Order No. MC-342. By order dated December 6, 1976, the proceeding was reopened for reconsideration on the present record. Requested findings not spe-

cifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

In Released Rates Application No. MC-525, dated June 9, 1952, certain carriers named in the National Motor Freight Classification and the American Trucking Associations petitioned the Commission for authorization under sections 20(11), 219, and 413 of the act to establish and maintain ratings for the transportation of property dependent upon the agreed or declared value stated therein, namely, "50 cents per pound for each article." The application stated that the sought ratings were justified because the Commission on May 27, 1952, had approved (in Released Rates Order No. 1104) comparable ratings and provisions for the railroads, which were to be concurrently published in their new Uniform Freight Classification No. 1.[1] The Commission granted the application pursuant to Released Rates Order No. MC-342, dated August 13, 1952. The ratings were subsequently published in the National Motor Freight Classification.

By petition filed on January 8, 1974, the Drug and Toilet Preparation Traffic Conference (petitioner), on behalf of its members, requested the issuance of a declaratory order interpreting the liability limitation on drugs and related commodities authorized in Released Rates Order No. MC-342 and published in the National Motor Freight Classification. The limitation provides for a certification by the shipper that "The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding 50 cents per pound for each article." Petitioner,

[1] The order which authorized rail ratings based on agreed values of "50 cents per pound for each article" was rescinded by Released Rates Order No. 1113 of December 10, 1953; that order, currently in effect, provides for agreed values of "50 cents per pound"—such values to be related "to the gross weight of each shipping package separately, and not to the shipment as a whole."

in effect, alleges that the liability limitation is ambiguous and that different interpretations of it are being applied by carriers in processing claims for loss and damage.

By order entered on April 25, 1974, the Commission, Division 2, determined that a controversy or uncertainty exists which would warrant the entry of a declaratory order, and it instituted a proceeding to determine the question presented. The Commission directed that the matter be handled under modified procedure, and the proceeding was subsequently assigned to an Administrative Law Judge for an initial decision.

In an initial decision, the Administrative Law Judge concluded that, in determining the limit of liability under the agreed valuation of 50 cents per pound "for each article" in the drug and chemical list, the agreed valuation should be multiplied by the weight of the smallest identifiable unit.

In a report and order on exceptions, Review Board No. 4 reached a different conclusion from that recommended in the initial decision, holding that, as used in the context of the released rates application and order, the word "article" means the case, container, or package.

In a report on reconsideration dated July 12, 1976, division 2 reach a conclusion similar to that recommended in the initial decision and differing from that set forth in the report of Review Board No. 4. A petition for reconsideration was filed by petitioner and adopted by supporting intervener, Shippers National Freight Claims Council. Replies opposing reconsideration were filed by certain respondents.

As above indicated, division 2, by order dated December 6, 1976, has reopened the proceeding for reconsideration on the present record. The record in this proceeding is fully described in our prior report and will not be repeated here.

Discussion and Conclusions

In our prior report, we recognized the ambiguity in the released rates provisions at issue;[2] yet, in order to avoid the possibility of discrimination through disparate payments to shippers for loss and damage, and so that we might harmonize the involved rates with the history and purpose of released rates as reflected in past decisions interpreting somewhat similar provisions, we adopted an interpretation of the word "article" that comported more with its general usage than with its specific usage in those provisions. Because of the highly unusual circumstances surrounding publication of the provisions at issue and the absence of evidence that the particular phraseology employed is currently used in other publications, we have examined the provisions of all our outstanding released rates orders, and note that no such orders contain provisions precisely the same as those here involved. We are now, therefore, satisfied that the scope of this proceeding is sufficiently narrow to permit an interpretation of the word "article" that comports with its specific usage without risk of unlawful discrimination or any impairment of the history and purpose of released rates.

As stated, this proceeding is limited to a very narrow issue—the interpretation of the word "article" as specifically used in Released Rates Order No. MC-342 dated August 13, 1952.[3] That order permits motor carriers to limit their common carrier liability to "50 cents per pound *for each article*" in a list of more than 100 classification descriptions included in the National Motor Freight Classification. Our interpretation will determine whether the carriers' liability for partial loss or damage should be

[2] In our prior report, we admonished respondents to take greater care to use unambiguous terms in released rate tariffs in the future.

[3] Released Rates Order No. MC-342 and Released Rates Application No. MC-525 are reproduced as appendix A hereto.

fixed by relating the 50 cents per pound limitation to (a) the weight of the commodity shipped; (b) the weight of the carton containing the lost or damaged portion of the commodity shipped; or (c) the weight of the smallest identifiable unit of the lost or damaged commodity shipped, such as a bottle. Interpretation (a) is the most favorable to the shippers; interpretation (c) is the most favorable to the carriers; both shippers and carriers oppose interpretation (b).

We conclude that, as used in Released Rates Order No. MC-342 and in the relevant items of the National Motor Freight Classification, the clause describing the released value of property as "50 cents per pound for each article" should be deemed to relate to the weight of each commodity in the shipment, and in event of loss or damage to a portion of the shipment, the amount recoverable should be the released value per pound multiplied by the gross shipping weight of each commodity involved, but not more than the loss or damage actually sustained. We make no conclusion as to the construction of similar limitation clauses which do not include the phrase "for each article" or as to the merits of applying the involved classification ratings upon a declaration of released value other than "50 cents per pound for each article." However, we recognize the need for further carrier and shipper discussion of released value rates and ratings, and offer the services of this agency to facilitate such discussions.

Our authority to approve motor carrier rates dependent upon and varying with declared or agreed values is set forth in section 210 of the act which makes applicable the provisions of section 20(11).[4] Section 20(11) empowers the

[4] Section 20(11) provides as follows:

> * * * no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier * * * from the liability hereby imposed; and * * * any common

Commission, insofar as released rates are concerned, to order departures from the normal common carrier liability for full loss and damage. Since such orders are clearly exceptions to the recognized general policy against any limitation of liability by a common carrier,[5] they should be clearly stated and must, under the statute, be "expressly authorized." However, since the section is silent on methodology, liability may be expressed in absolute or relative

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carrier * * * delivering said property so received and transported shall be liable * * * for the full actual loss, damage, or injury to such property caused by it * * * and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared unlawful and void * * * *Provided, however,* that the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply * * * to property * * * concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released * * * and the Commission is hereby empowered to make such orders in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation.

[5] The very purpose of the second Cummins amendment—now incorporated into section 20(11)—was to:

> * * * restore the law of full liability as it existed prior to the Carmack amendment of 1906, so that when property is lost or damaged in the course of transportation under circumstances as to make the carrier liable, recovery is had for full value or on the basis of full value. [Senate Committee on Interstate Commerce, Report No. 394-64th Congress, 1st Session] [*Gold Hunter Mining Co.* v. *Director General,* 63 I.C.C. 234].

terms, and its limitation measured by the entire shipment and/or by any component thereof, whether in specific total amounts, fixed amounts per unit of weight, percentages of actual value per unit of weight, or upon some other basis. In short, although motor and rail common carriers have traditionally favored rates based on fixed released values per unit of weight, the Commission may authorize any form of released rates, provided only that, in its opinion, such rates are "just and reasonable under the circumstances surrounding the transportation."

In adopting a construction of the word "article" as used in our 1952 order in No. MC-342 and in related items of the National Motor Freight Classification, we have given consideration to the circumstances surrounding the transportation of the property involved, including the context in which the word was used in the application to which the order responds, the language used in exceptions and commodity tariffs naming released rates on the same list of commodities, and the possible impact of such a construction upon the carriers and members of the shipping public. We are also mindful of the well-established rule that all tariffs[6] are to be construed according to *their* language; that the intention of the framers, although important, is not necessarily controlling; that their terms should be so clearly stated as to avoid misrepresentation or misunderstanding; and that in case of ambiguity they must be construed against the maker. *Grain Products to Southern Territory,* 165 I.C.C. 23, 25 (1930).

The evidence shows that, in seeking authority to publish the released classification ratings at issue, the motor carriers were concerned about remaining competitive with the railroads which only a few weeks earlier had sought and obtained similar released rates authority. Some concern

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[6] The rule of construction applies to governing tariffs such as the National Motor Freight Classification.

had also been expressed about the possibility of the catastrophic loss of an entire shipment, but no mention was made in either the rail or motor carrier applications of partial loss or damage. Released Rates Order No. 1104 of May 1, 1952, authorized the railroads to publish in their new Uniform Freight Classification ratings for various articles on the drug and chemical list based upon released valuations of "50 cents a pound for each article." Such order was rescinded by Released Rates Order No. 1113 of December 10, 1953, when the rail valuation clause in the relevant items of the Uniform Freight Classification was changed from "50 cents per pound for each article" to "50 cents per pound." On the other hand, no change has ever been made in the valuation clause set forth in Released Rates Order No. MC-342 or in the relevant items of the National Motor Freight Classification. Thus, there is a distinct difference between the liability provisions surrounding the transportation of property under released class rates via rail and those surrounding the transportation of property under released class rates via motor carriers. Moreover, whatever competitive need there might once have existed for maintaining identical liability provisions for rail and motor carriers, it has obviously long since ceased to be a classification factor of any real significance.

The evidence also establishes that the released value ratings as published were the same as the then-existing nonreleased, full-liability ratings on the same list of commodities which were published in exceptions and commodity tariffs applicable throughout major freight rate territories. Thus, in many instances the only result of publication of the released ratings in the National Motor Freight Classification was a reduction in the liability of the carriers with no corresponding reduction in rates to the shippers. Beyond that there was little, if any, change in the circumstances surrounding the actual transportation of articles on the drugs and chemicals list brought about by the re-

leased value ratings. The expected benefit to the shipper, i.e., the consideration supporting the limitation of liability, was the assurance that it could continue to move its products at the same rating as under full-liability rates in event the carriers discontinued all their exceptions tariffs as contemplated in docket No. 28310, *Class Rate Investigation, 1939,* 262 I.C.C. 447 (1945), a development then generally assumed to be relatively imminent. Such an assumption has not proved to be completely accurate, for although the railroads have sharply reduced the use of exceptions tariffs, the motor carrier respondents continue to use them to a significant degree. Although the foregoing circumstances do not act to nullify the agreed ratings involved, they are factors to be considered with others in determining which possible construction of the provisions at issue would be most consistent with the quality of consideration that supports the departure from normal common carrier liability.

Another important factor in construing the provisions at issue is the context in which the word "article" was used in the application, order, and relevant items of the National Motor Freight Classification. We agree with petitioner that in both the application and order the word "article" is used to denote a commodity classification description, a construction recognized (though not adopted) in our prior report. The application seeks authority to publish agreed valuation ratings on "articles named below," then lists under the caption "Articles" more than 100 separate classification commodity descriptions, the valuation declaration at issue ("50 cents per pound for each article"), and a provision for nonapplication of the ratings were lower charges result by applying provisions in individual descriptions for such "articles"; on the very next line the carriers explain in justification of the proposed ratings that "the various commodities" listed in the application have a wide range of values. Clearly, such a usage

of "article" equates it with the word "commodity." Such a usage is completely consistent with that in the classification itself which, throughout its many pages, employs the word "article" in precisely the same manner. Moreover, as applied to normally expected shipping situations such a construction would be in order. Considering the fact that the list of articles consists of many separate descriptions of commodities that could be included in the same shipment —with each other or with commodities moving under non-released, full-liability rates—it would be natural to declare valuations on the basis of the articles involved.[7]

Since we have concluded that "article" was specifically used to denote "commodity" we will substitute the latter for the former word when comparing the valuation clause at issue with those discussed in other proceedings in which the word "article," if used at all, would have been used in an entirely different context. However, having determined that as used in Released Rates Order, No. MC-342, the word "article" is synonymous with "commodity," there remains to be determined the extent to which the valuation clause of "50 cents per pound for each 'commodity' " affects the carriers' liability for loss or damage to property transported.

Respondents argue that it makes no difference how "article" is defined since legal precedent has established

[7] For example, if a shipment of 660 lb is made up of 100 lb of acids moving under nonreleased rates, and 10 lb of capsules, 50 lb of chemicals, and 500 lb of drugs moving under released rates, the carriers' liability—whether for full or partial damage—would be subject to the following limitations:

Article or commodity	Amount
Acids	No limit
Capsules (10 x 50¢)	$5
Chemicals (50 x 50¢)	25
Drugs (500 x 50¢)	250

that there is no right to recovery of actual damages up to an arbitrary maximum valuation based on total shipment weight, citing *Western Transit Co.* v. *A. C. Leslie & Co.*, 242 U.S. 448 (1917), *Metals or Metal Alloys*, 311 I.C.C. 617 (1960), *Goldstein & Leavy, Inc.*, v. *Arrow Carrier Corp.*, 53 M.C.C. 9, 14 (1951), and *Adeline Apparel Shops, Inc.*, v. *Savage Truck Lines, Inc.*, 63 M.C.C. 369 (1955). We do not agree that legal precedent obviates the need for definition of the word "article" as used herein. The fact that the form of valuation clause involved in the cited cases was insufficient to permit recovery of actual damages up to an arbitrary limit[8] does not establish the precedent that all released rates provisions prevent recovery of actual damages up to a maximum measured by the total weight of the commodity shipped. The extent of recovery authorized depends upon the particular valuation clause need,[9] for as previously stated, section 20(11) does not prevent the measurement of liability by the weight of the entire shipment and/or any component thereof as long as the rates are reasonable. In the cited cases, the valuations, all of the same basic form, were expressed as: "not to exceed $100.00 per ton" (*Western Transit* case), "not exceeding 50 cents per pound actual weight" (*Goldstein & Leavy* and *Adeline Apparel* cases), and "not exceeding 40 cents per pound" (*Metals or Metal Alloys* case); they included no language whereby the limitation of liability might conceivably be measured by some component other than the weight of the lost or damaged portion. Here, however, the valuation

[8] A summary of cases cited herein appears as appendix B hereto.

[9] As we stated in *Adeline Apparel Shops, supra:*

> There are various methods under which damages are computed, and the specific amount to be awarded depends upon the type of shipment, the commodity, the extent of the loss or injury, and the relation or proportion that the released value bears to the actual value of the entire shipment, among other factors.

clause includes language not present in any of the cited cases—language capable of being construed so as to signify a component other than the lost or damaged portion by which the limitation of liability might be measured. Such language may not be disregarded, for it is an elementary rule of contract construction that effect be given, if possible, to every word, clause, or sentence. *Pillsbury Flour Co.* v. *Great Northern R.R.*, 25 F. 2d 66, 69 (1928). Consequently, as indicated in our prior report, it does make a significant difference as to how "article" is defined.

It is appropriate to comment at this point on the related statement in our prior report that the valuation of the property transported is not meant to set an absolute limit of liability but rather a ratio of loss to recovery by the shipper.[10] Such a statement does in fact appear in *Western Transit Co.* v. *Leslie & Co., supra,* at 454. However, the full statement reads as follows:

> The "released" or agreed valuation is $100 per net ton. There were 25 tons in this shipment. It is insisted that as the 25 tons constituted a single lot, $2,500 is recoverable for loss of or damage to the whole or to any part of the lot. This construction does violence to the language used and is unreasonable. The valuation clause fixes not an arbitrary limit of recovery, but a ratio.

It is apparent from the foregoing that the court was referring to the particular clause it had been called upon to construe. Although substantially similar clauses have been

[10] Were we to conclude that the valuation clause approved by us in 1952 fixed a ratio of loss to recovery, we would out of a sense of fairness be forced to point out that the carriers have completely disregarded that ratio over the years by failing to make any adjustment whatsoever in the recovery factor in order to coincide with the substantial changes in the loss factor brought about by the increasing commodity prices and freight rates.

widely used in rail and motor carrier released rates provisions, it does not follow that other valuation clauses may not be so worded as to produce results which differ from those reached in *Western Transit.* We did not discuss such a possibility in our prior report; neither did we discuss the wording of valuation clauses used in connection with released rates on identical commodities published in motor carrier exceptions and commodity tariffs.

Released Rates Order No. MC-359 of March 29, 1954, authorizes parties to the National Motor Freight Classification to establish and maintain truckload and volume commodity rates on the same list of items as embraced herein. Additionally, various other released rates orders [11] authorize certain motor carrier tariff publishing agencies to establish and maintain less-than-truckload commodity rates on the same list of items. All of these orders provide that the commodity rates will be based on an agreed valuation of "50 cents per pound" (they omit the phrase "for each article" as set forth in our basic order in No. MC-342), and in addition authorize recovery of actual value of the lost or damaged portion up to the released value of the package.[12] Therefore, to adopt the position in this case that the limitation of motor carrier liability should be measured by the weight of the smallest unit lost or damaged would produce an anomalous situation in which the limit of liability on the identical commodities would be set at a lower level when moving under class rates than when moving under commodity rates. Stated otherwise, the shipper who moves at higher rates would recover less than the shipper

[11] Released rates orders No. MC-684 of September 26, 1966, No. MC-703 of June 28, 1967, and No. MC-734 of June 6, 1968.

[12] All orders relating to released value commodity rates provide:

> In case of loss or damage to a portion of the contents of a shipping package, the amount recoverable will be the released value per pound multiplied by the weight of the package, but not more than the actual loss or damage.

who moves at lower rates. Although such a preposterous result would not have been possible had the liability provisions of the Classification been modified so as to coincide with those of commodity tariffs, or *vice versa,* the fact remains that respondent motor carriers have not seen fit to seek authority to modify the Classification or Released Rates Order No. MC-342. We must, therefore, consider the language of the order as it is, not as it might have been. Such language makes no provision whatsoever for measuring the limit of liability by the weight of the package; yet, as indicated previously, it may be construed so as to permit measurement of the limit of liability by the weight of the commodity shipped. Such a construction is the only one that recognizes the distinction between class rates and commodity rates while observing the basic principle underlying released rates that reductions in liability and reductions in rates should go hand in hand.

We believe that an interpretation relating the valuation at issue to the weight of each commodity in the shipment gives proper recognition to the needs and rights of members of the shipping public without placing the motor carriers in any real financial jeopardy. Regardless of their individual claims policies, respondent motor carriers would continue to be protected against the catastrophic loss of an entire shipment, as heretofore. Thus, the extent to which they would be affected would be determined by the degree to which their present policy with respect to partial loss and damage claims is inconsistent with our interpretation of the shipper's right of recovery. There is no evidence as to the frequency or level of claims paid by the motor carrier industry for the loss or damage of the commodities here involved. Although spokesmen for several of respondents' motor carrier members indicated that claims for partial loss or damage were settled on the basis of weight lost times the unit valuation, no supporting evidence was presented. On the other hand, petitioner established by competent evidence that some of respondents' members

settle claims for partial loss or damage on the basis of the total weight shipped times the unit valuation. The fact that those particular carriers are able to honor claims on a basis favorable to shippers without noticeable financial impact demonstrates that other carriers should be able to pursue the same policy with respect to the commodities at issue without any fear of financial jeopardy. Moreover, as the parties are no doubt acutely aware, there has been no change whatsoever in the level of the released valuations since they were first established in 1952. In other words, although the actual value of these commodities and the freight rates charged by respondents for their transportation may have more than doubled, members of the shipping public may today recover no greater amount for lost or damaged items than they were able to recover a quarter of a century ago. Considering the steadily declining value of the dollar, the carriers' liability under these released rates may eventually become so nominal as to become almost meaningless.

In our prior report, we indicated concern about the possibility of discrimination in the form of disparate payments to shippers for loss and damage. The thrust of that concern was directed to the type of disparity that could result from the conclusion of the review board that the valuation clause at issue should be construed so that liability would be determined on a packing-case basis. As previously stated, a review of our released rates orders indicates that many of them include conditions which provide that in case of partial loss or damage the limit of liability shall be measured by the weight of the packing case or container. Although such conditions are not included in the order at issue, we have in the past approved their use when warranted by the circumstances and conditions surrounding the particular traffic. *Metals or Metal Alloys, supra,* 618. While we continue to recognize the possibility of disparate payments for loss and damage due to the fact that shippers may not all use the same size of container for the

same item, we are convinced that such disparity would not constitute the sort of discrimination proscribed by the act. We are likewise convinced that disparity in loss and damage payments due to the fact that some shippers ship more or less of the same commodity than others would not constitute unjust discrimination. Consequently, we see no reason to be concerned about any potential discrimination in a valuation clause that measures the limit of liability by the weight of the commodity shipped. The only remaining discrimination—that resulting from applying different interpretations of the valuation clause at issue—should be corrected by our order herein.

We again remind all parties that our decision is strictly limited to defining the phrase "for each article" in connection with the publication of released value classification ratings on drugs, chemicals, medicines, toilet preparations, and other related articles, pursuant to authority granted in Released Rates Order No. MC-342. We recognize that the definition we have adopted will result in a somewhat different basis for the settlement of partial loss and damage claims than has been observed by many of the respondents. However, we also recognize that the entire subject of released rates has not come under joint review by carriers and shippers for many years, and that within that time the provisions of many such rates may have become distorted by changes in circumstances and conditions surrounding the particular traffic involved. Accordingly, we encourage respondents to initiate joint informal discussions among members of the particular industry groups utilizing released rates—including those based on the ratings here in issue—with the view of making them more responsive to the actual claims experience of the carriers and to the changing requirements of the shipping public.[13]

[13] Such discussions might include consideration, among other matters, the following questions: (1) Should a distinction be made between "declared and agreed" rates? (2) Are released rates, especially those based on fixed monetary valuations, a proper element of freight classification, or should such rates be limited to publication in commodity tariffs? (3) since the statutory authority provides for released rates that vary with valuation, should not such rates provide for the level of the valuation to change with the level of the rate? (4) Should released rates orders be made subject to expiration dates so that the limit of liability may be periodically reviewed in light of changing values and consumer requirements? (5) Why is the agreed value expressed as a fixed amount per unit of weight rather than as a fixed percentage of invoice or actual value per unit of weight? Might it not be related to a commodity or rate index that would change annually?

We find, That the term "article" in the phrase "not exceeding 50 cents per pound for each article" means each commodity in a shipment of drugs, chemicals, medicines, toilet preparations, or other related commodities.

We further find, That in event of loss or damage to a portion of the shipment, the amount recoverable should be the released value of 50 cents per pound multiplied by the gross shipping weight of each commodity involved, but not more than the loss or damage actually sustained.

We further find, That the findings of our prior report are modified to the extent they are inconsistent with those set forth herein.

And we further find, That this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER HARDIN, dissenting:

I am not convinced from the record presented in this proceeding that the term "for each article" can be interpreted as being synonymous with "commodity." I believe that the correct interpretation is "per container or case."

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission, Division 2.

ROBERT L. OSWALD.
Secretary.

(SEAL)

APPENDIX A

INTERSTATE COMMERCE COMMISSION

RELEASED RATES ORDER No. MC-342

IN THE MATTER OF APPLICATIONS NOS. MC-524 AS AMENDED, AND MC-525 AS AMENDED, UNDER SECTIONS 20(11), 219, and 413 OF THE INTERSTATE COMMERCE ACT, AS AMENDED

PRESENT: J. Haden Alldredge, Chairman, to whom the above-entitled matter has been assigned for action thereon.

The Commission having been petitioned for and on behalf of carriers and freight forwarders parties to the National Motor Freight Classifications, Nos. 11, MF-I.C.C. No. 1, I.C.C. No. 1 and I.C.C. FF No. 1, and National Motor Freight Classification No. A-1, MF-I.C.C. No. 3, American Trucking Associations, Inc., Agent, for authority to establish and maintain ratings for the interstate and foreign transportation of drugs, medicines, toilet preparations, essential oils, and other articles as described in Released Rates Applications Nos. MC-524, as amended, and MC-525, as amended, dependent upon the released value of the property, and the applications having been considered and good cause therefor appearing.

It is ordered, That all common carriers by rail or motor vehicle and freight forwarders who are now, or may hereafter become, parties to said National Motor Freight

Classification No. 11, and National Motor Freight Classification No. A-1, supplements thereto or reissues thereof, be, and they are hereby authorized to establish and maintain by filing and posting in the manner prescribed in the Interstate Commerce Act, ratings in said Classifications for the interstate and foreign transportation of articles described in the said applications, dependent upon value declared in writing by the shipper, or agreed upon in writing as the released value of the property, as specified in the said applications, subject to the condition that on the drugs, medicines, toilet preparations and other articles described in Released Rates Application No. MC-525, as amended, the released value stated by the shipper shall be void as an agreement limiting the carriers or freight forwarders liability unless supported by a consideration in the form of a reduced charge for transportation.

It is further ordered, That in the publication of "Note 1", proposed in connection with the drugs, medicines, toilet preparations and other articles, provisions will be included as follows:

> Subject to the condition that the released value stated by the shipper shall be void as an agreement limiting the carriers or freight forwarders liability unless supported by a consideration in the form of a reduced charge for transportation.

It is further ordered, That changes may be made in any rating, minimum weight, or packing specification established under the authority of this order, but the commodity description may not be broadened to embrace other commodities or articles, nor may any change be made in the released value upon which the ratings are dependent, without specific authority of the Commission.

And it is further ordered. That the Classifications containing released ratings filed under the authority of this order shall show, in connection with such ratings, a notation substantially as follows:

The released values upon which the ratings provided in Item No. are dependent have been authorized by the Interstate Commerce Commission by Released Rates Order No. MC-342 of August 13, 1952, subject to complaint or suspension.

The Commission does not approve the lawfulness, except under Sections 20(11), 219 and 413 of the Interstate Commerce Act, of any rating that may be filed under authority of this order.

Dated at Washington, D.C., this 13th day of August, 1952.

By the Commission, Chairman Alldredge.

W. P. Bartel.
Secretary.

(Seal)

June 9, 1952
File: 121-9

To the Interstate Commerce Commission
Washington 25, D. C.

Application No. 14

For Authority to Publish Ratings on Essential Oils Based on Agreed or Released Value

The Carriers named in National Motor Freight Classification No. A-1, MF-ICC No. 3 and National Motor Freight Classification No. 11, MF-ICC No. 1, ICC No. 1, ICC-FF No. 1, American Trucking Associations, Inc., Agent, F. G. Freund, Issuing Officer, do hereby respectfully petition the Interstate Commerce Commission that authorization be granted under Sections 20(11), 219 and 413 of the Inter-

state Commerce Act, and as amended, to establish and maintain ratings for the transportation of property dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property on the following:

OILS, NOT NAMED IN OTHER MORE SPECIFIC GROUPS:

Item No.	Description	LTL	TL.	Min. Wt. Factor
72690-A	Essential, Natural or Artificial, NOI, value declared in writing by the shipper or agreed upon in writing as the released value of the property in accordance with the following, see Note, in barrels or boxed or in jacketed metal cans in crates, or in copper drums:			
	If not exceeding 50 cents per pound	70	40	30.6
	If exceeding 50 cents but not exceeding $1.00 per pound	100	70	24.6
	If exceeding $1.00, but not exceeding $2.50 per pound	200	150	24.6
	If exceeding $2.50, but not exceeding $5.00 per pound	300	250	24.6
	If exceeding $5.00, but not exceeding $7.50 per pound	400	350	24.6
	If exceeding $7.50 per pound or if in carboys —Not taken.			

It has been shown that essential oils have a wide range of values. Among these are Cajeput, with values ranging from $2.10 to $2.70 per pound; Cedar leaf, from $2.25 to $3.50 per pound; Cedarwood, from $.55 cents to 65 cents per pound; Eucalyptus, from $1.00 to $1.50 per pound; Lemon, from $5.65 to $8.20 per pound; Orange, from $1.80 to $5.85 per pound, with sesquiderpeneless orange oil having values ranging from $175.00 to $180.00 per pound; peppermint, from $7.25 to $8.30 per pound. These values were taken from Oil, Paint and Drug Reporter, issue of May 26, 1952.

The primary purpose of this application is to enable Motor Carriers to publish in their new National Motor Freight Classification No. A-1 uniform ratings and provisions on a competitive basis the same as published by the rails in their Uniform Freight Classification No. 1. The same provisions as here proposed are incorporated in the Twentieth Section Application No. 1438 of the rails' Uniform Classification Committee filed with the Commission November 15, 1951, and as amended March 19, 1952. Publication has been accomplished in item 34235-A, Supplement No. 2 to Uniform Freight Classification No. 1, under authorization of Released Rates Order No. 1104 of May 1, 1952.

Present provisions on which this authorization is requested are now published in item 72690 of National Motor Freight Classification No. 11. Prior to the rail publication of new provisions based upon released values, as set forth above, Motor Carriers were on a competitive basis with the rail lines on this class of traffic. If this authority is granted item as above cited will be canceled and superseded by the contemplated new publication.

The primary purpose of the application is to enable Motor Carriers to publish in their New National Motor Freight Classification No. A-1 uniform ratings and provi-

sions on a competitive basis the same as the rails have published in their Uniform Freight Classification No. 1.

Motor Carriers justification for this petition rests solely upon the competitive factor involved, and if authorization is granted by the Commission such authorization would follow the same logic and reasoning of the Commission in granting Motor Carriers Section 219 relief as contained in the Commission's Released Rates Order MC No. 1 of January 16, 1936. Motor Carriers are confronted with the same problem as the rails in transporting Essential Oils.

WHEREFORE, in order that the above set forth provisions may be published in lieu of those presently applicable it is respectfully requested that your honorable Commission issue an order granting permission to publish the aforementioned provisions in both National Motor Freight Classifications.

Respectfully submitted,

AMERICAN TRUCKING ASSOCIATIONS, INC., AGENT

F. G. Freund, Issuing Officer
NATIONAL MOTOR FREIGHT CLASSIFICATIONS

June 9, 1972
File: 121-9

To the Interstate Commerce Commission
Washington 25, D. C.

Application No. 15

For Authority to Publish Ratings on Drugs, Chemicals, Medicines, etc., Based on Agreed or Released Value

— — — — —

The carriers named in National Motor Freight Classification No. A-1, MF-I.C.C. No. 3 and National Motor Freight Classification No. 11, MF-I.C.C. No. 1, I.C.C. No. 1 and I.C.C. FF No. 1, American Trucking Associations, Inc., Agent, F. G. Freund, Issuing Officer, do hereby respectfully petition the Interstate Commerce Commission

that authorization be issued under Sections 20(11), 219 and 413 of the Interstate Commerce Act, and as amended, to establish and maintain ratings for the transportation of property dependent upon the agreed or declared value being stated on the following:

Item No.	Description	LTL Vol. Min. wt.
33465	Drugs, chemicals, medicines, toilet preparations and other articles named below, value declared in writing by the shipper, or agreed upon in writing as the released value of the property, not exceeding 50 cents per pound, see Notes 1 and 2, items and , viz:	

Articles	As shown in items
Acids	110 to 460 incl.
Albumen, blood	2970
Alginates, ammonium or sodium, dry	3020
Anti-freezing compound, NOI	4220
Antimony sulphide, concentrated ore (needle antimony), pulverized or powered [sic] (black sulphide, not purified), in barrels or boxes	26270
Arsenic, metallic	68460
Balsam crude, NOI	8190
Bananas, powered [sic]	41580
Barks, NOI	8250 and 8260
Barks, slippery elm or soap	8320
Beans, Honey (St. Johns Bread)	9210
Beans, Tonka	39330
Beans, vanilla or tahiti	39340
Berries, juniper or sloe, dried	9350

Articles—Continued	As shown in items
Berries, palmetto	9360
Beverage preparations, NOI, dry	39350
Bismuth metal	68490
Blue, Ultramarine	74750
Bluing, Laundry, dry	9850
Brushes, tooth, in boxes	14580
Calcium, metallic	68540
Capsules, gelatine	19500
Cellulose, NOI	20630
Cellulose, woodpulp, NOI	20630
Charcoal, other than animal or wood, NOI not activated	21240
Charcoal, wood, NOI, not activated	21250
Chemicals	(21320 to 22140, incl. (22160 to 22880, incl. (22910 to 23080, incl. (23100 to 23170, incl. (23190 to 24040, incl. (24100 to 25800, incl.
Cochineal	28080
Coffee, extract of (condensed coffee)	39550 & 39560
Color, butter	28220 & 28230
Color, cheese	28240
Confectioners, colorings	29890
Deer Tongue	39080
Dental impression compound	32040
Dextrine or British gum, dry	32280
Deodorants or disinfectants, NOI	32240
Drugs	32900 to 33460, incl.
Dye, soap	33600
Dye stuffs, NOI	33610
Egg Albumen	31550
Embalming fluid	35260
Extracts, fustic or logwood, dry	35600

Articles—Continued	As shown in items
Extracts, malt or maltose (malt sugar) ..	40280 & 40290
Extracts, meat, with or without admixture or vegetable extracts including boullion cubes and soup tablets ...	39660
Extracts, sumac	35640
Figs, powdered	41640
Fireproofing compounds, liquid, NOI	38130
Flour bleaching compound, NOI	39010
Flowers, herbs or leaves, dried, NOI ..	39090 & 39100
Food curing, emulsifying, preserving or seasoning compounds, NOI	39900
Food, prepared, NOI .	39880
Foot warmer or hot bottle charges, chemical	41190
Fruit juice powders or crystals, citrus	40000
Gelatine sheets, transparent	45830
Ginger roots, dry, not ground or powdered	83800
Ginger roots, ground or powdered	83790
Grease, lanolin	47950
Gums	48020 to 48260, incl.
Gutta-percha	48400
Hoof dressing or animal ointment	52250
Insecticides, insect repellants or vermin exterminators, NOI, other than agricultural insecticides	53270
Licorice (licorice extract)	19220, 57140, 57150

Articles—Continued	As shown in items
Licorice roots, ground or powdered, other than spent	83820
Licorice roots, not ground or powdered	83830
Manganese-titanium ..	3210
Medicines	32900 to 33460 incl.
Milk food, other than malted milk, other than liquid	40390
Mordants, NOI	69850
Nutmegs	83840
Oil, aniline	72550
Oil, apricot or peach kernal [sic]	72560
Oil, camphor	72580
Oil, castor, NOI	72610
Oil, cod liver	37180
Oil, fish liver, edible or medicinal, NOI	72720
Oil, pine	72920
Peaches, powdered ...	41700
Pepper	83860
Prunes, powdered	41760
Psyllium seed hulls ..	80220
Pyroxylin solutions, NOI (liquid or jelly pyroxylin collodion)	80310
Quassia chips	80410
Quassia wood, powdered	80420
Quicksilver (metallic mercury)	68810
Refrigerator air purifier or deodorizer	83080
Rennet extract	83095 & 83100
Roots, NOI	83870 & 83880
Rubber accelerators or softerners, [sic] NOI	84040
Rum, denatured	84410
Scrap, cadmium, NOI .	68830
Seeds, cardamon	84770

Articles—Continued	As shown in items
Seeds, flower or garden, NOI	84900
Seeds, NOI	85120
Seeds, Psylium (Fleaseed)	85080
Sodium metallic	68930
Spermaceti	87050
Spices, NOI	83920
Starch, arrowroot	87670
Sugar of milk, refined	33420
Sumac leaves	88280
Toilet preparations	See Item, Drugs
Vegetable roots, NOI, not ground or powdered	83940
Wax, bees'	96520
Wax, candelilla	96530
Wax, carnauba	96550
Wax, Japan	96590
Wax, Laundry compound	96600
Wax, montan	96610
Wax, vegetable, NOI	96660
Yeast	41170 & 41180

Item No.	Description	LTL	Vol.	Min. wt.
	In packages (except carboys not complying with specifications of the American Trucking Associations, Inc., Agent, Tariff No. 7, MF-I.C.C. No. 2, I.C.C. No. 2, I.C.C. F.F.-No. 2, or successive reissues thereof) provided for LTL or TL shipments, as the case may be, in separate descriptions for articles; also TL, in tank trucks, Rule 23, as provided for in separate descriptions for articles	70	40	30.6

33466 Note 1—The value declared in writing by the shipper or agreed upon in writing as the released value of the property, as the case may be, must be entered on shipping order and bill of lading as follows:

"The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding 50 cents per pound for each article."

Authority to maintain ratings based on released value has been applied for under Application No. to the Interstate Commerce Commission.

33467 Note 2—Ratings named in item 33465, will not apply if consignor fails or declines to declare value or agree to release value in writing in accordance with Note 1, item 33466, nor if lower charges would result from the application of provisions in individual descriptions for articles.

It is a matter of record that the various commodities included in this application have a wide range in values. The following are cited as typical examples of the values involved:

Abumen, [sic] blood 70 cents to 80 cents per pounds; Bismuth Metal, $2.25 per pound; Alcohols, NOI, 11 cents to $4.00 per pound; Aldrin, 93 cents to $1.05 per pound; Benzine Hexachloride, up to $7.00 per pound; Pepper, white, $1.75 per pound; Pepper, black, $1.13 to $1.33 per pound;

Dyes or colors, coal tar, other than indiago [sic]; Drugs or Cosmetics, $2.25 to $35.90; other than Drugs or Cosmetics, 47 cents to $4.33 per pound. These values are taken from the Oil, Paint and Drug Reporter of May 26, 1952. Flower or Garden Seeds, NOI, have values ranging from 9 cents to $8.00 per pound, the latter being Cauliflower Seed. Tomato Seeds have value of about $1.25 per pound.

This subject appeared on the National Classification Board's Docket 53 as Subject 86, a Board proposal to establish in the National Motor Freight Classification comparable provisions, on a competitive basis, with those concurrently published by the rail lines in items 15502-A Supplement No. 2 to their New Uniform Freight Classification No. 1. Proposal was approved by the Board on May 27, 1952. The recommended disposition of the Board is fully set forth in an appendix to this application.

Public hearings conducted by the Board developed favorable reaction from shippers and carriers alike and evidenced a desire that Motor Carriers should be competitive on this class of traffic.

Motor Carriers justification for this petition rest solely upon the competitive factor involved, and if authorization is granted by the Commission such authorization would follow the same logic and reasoning of the Commission in granting Motor Carriers Section 219 relief as contained in the Commission's Released Rates Order MC No. 1 of January 16, 1936. Motor Carriers are confronted with the same problem as the rails in transporting the various commodities included in this application.

WHEREFORE, in order that the above set forth provisions may be published in lieu of those presently applicable it is respectfully requested that your honorable Commission issue an order granting permission to publish the aforementioned provisions in the National Motor Freight Classifications.

Respectfully submitted,

AMERICAN TRUCKING ASSOCIATIONS, INC.
AGENT

F. G. Freund, Issuing Officer
NATIONAL MOTOR FREIGHT CLASSIFICATION

APPENDIX B

Summaries of cases which involve the interpretation of valuation clauses

Western Transit Co. v. *A. C. Leslie & Co.* 242 U.S. 448 (1917), involved rates on copper ingots released to a value not to exceed "$100.00 per ton" shipped on a bill of lading stating that the shipper "agrees to the specified valuation in case of loss or damage * * * because of the lower rate thereby accorded for transportation". One ton of a 25-ton shipment was stolen and the shipper insisted that since the 25 tons constituted a single lot, $2,500 was recoverable for loss or damage to the whole or any part of the lot. The Court held that the shipper was entitled to recover not more than $100 a ton for each or any ton damaged or lost because the particular valuation clause fixed "not an arbitrary limit of recovery, but a ratio."

Goldstein & Leavy, Inc. v. *Arrow Carrier Corp.*, 53 M.C.C. 9 (1951), involved an application for authority to establish rates on unfinished rayon piece goods when released to a value not exceeding "50 cents per pound actual weight" on shipments in excess of 100 pounds. The application had provided that the carrier's liability on shipments over 100 pounds would be limited to "50 cents per pound actual weight of the lost or damaged portion." The related released rates order (No. MC-208) authorized released rates "as specified in the application" without spelling out that recovery would be limited to the actual weight of the lost or damaged portion. The Commission, Division 1, said that its failure to specifically prescribe the exact

language to be used could not be construed as creating any greater liability than was agreed valuation multiplied by the weight of the lost or damaged portion.

Adeline Apparel Shops, Inc. v. *Savage Truck Lines, Inc.*, 63 M.C.C. 369 (1955) involved rates on clothing and dry goods when released to a value of "not exceeding $50 for shipment of 100 pounds or less, or not exceeding 50 cents per pound actual weight for any shipment in excess of 100 pounds the carrier's liability should be for the actual value of the loss up to $50.00. The Commission disagreed, adopting the finding of an examiner that the involved provisions did not appear to be ambiguous or indefinite, and since the shipment was in excess of 100 pounds the limitation was, as clearly stated, "50 cents per pound actual weight."

Metals or Metal Alloys, 311 I.C.C. 617 (1960), involved applications for authority to establish ratings on certain new super metals and alloys used in the atomic energy, military, space, and other programs when released to a value not exceeding "40 cents per pounds." (Other ratings, also expressed on a "per-pound" basis were provided.) However, unlike the applications which specified that there should be no partial recovery clause, the related released rates orders (Nos. MC-439 and 1185) provided for the ratings to be made subject to a partial-recovery clause permitting recovery for loss or damage up to the gross weight of the package. Evidence developed at a subsequent hearing on the matter showed that the released value ratings had been developed by the carriers in cooperation with the industry; that all shippers participating in negotiations had understood and agreed that the ratings would not be subject to a partial-recovery clause, and that if required to include such a clause the involved carriers would seek to increase or cancel the ratings. The Commission, Division 2, held that such surrounding circumstances did not warrant the imposition of a partial-recovery clause, and ordered its elimination.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

No. 35944

Drug and Toilet Preparation Traffic Conference—Petition for Declaratory Order—Liability Limitation

Decided July 12, 1976

Declaratory order entered determining the meaning of the liability limitation of "50 cents per pound for each article" which is published in the National Motor Freight Classification in connection with released ratings on drugs and related commodities. Proceeding discontinued.

Daniel J. Sweeney for petitioner.

William J. Augello and *W. C. Bath* for interveners in support of petitioner.

Thomas M. Auchincloss, Jr., Robert E. Born, Don R. Devine, S. S. Eisen, James V. Fleming III, Gerald W. Hess, Vincent J. Hudec, William E. Kenworthy, Jeffrey Kohlman, F. H. Lynch, Jr., Larry E. May, G. D. Michalson, W. C. Mitchell, Duncan B. Phillips, and *Bryce Rea, Jr.*, for replicants.

REPORT OF THE COMMISSION ON RECONSIDERATION

DIVISION 2, ACTING AS AN APPELLATE DIVISION, COMMISSIONERS HARDIN, GRESHAM, AND CORBER

CORBER, *Commissioner:*

In the prior report entered July 3, 1975 (not printed), Review Board Number 4 modified the initial decision of the Administrative Law Judge interpreting the liability limitation of "50 cents per pound for each article" as published in the National Motor Freight Classification in con-

nection with released ratings on drugs and related commodities, pursuant to authority granted in Released Rates Order No. MC-342. By order dated November 14, 1975, the proceeding was ropened for reconsideration on the present record. Requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

In Released Rates Application No. MC-525, dated June 9, 1952, certain carriers named in the National Motor Freight Classification and the American Trucking Associations petitioned the Commission for authorization under sections 20(11), 219, and 413 of the act to establish and maintain ratings for the transportation of property dependent upon the agreed or declared value stated therein, namely, "50 cents per pound for each article." The Commission granted the application pursuant to Released Rates Order No. MC-342, dated August 13, 1952. The ratings were subsequently published in the National Motor Freight Classification.

By petition filed on January 8, 1974, the Drug and Toilet Preparation Traffic Conference (petitioner), on behalf of its members, requested the issuance of a declaratory order interpreting the liability limitation on drugs and related commodities authorized in Released Rates Order No. MC-342 and published in the National Motor Freight Classification. The limitation provides for a certification by the shipper that "The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding 50 cents per pound for each article." Petitioner, in effect, alleges that the liability limitation is ambiguous and that different interpretations of it are being applied by carriers in processing claims for loss and damage.

By order entered on April 25, 1974, the Commission, Division 2, determined that a controversy or uncertainty exists which would warrant the entry of a declaratory order, and it instituted a proceeding to determine the question presented. Interveners in support of petitioner are Farmland Industries, Inc., and Shippers National Freight Claims Council. Appearing as respondents in opposition are the Freight Forwarders Conference, Hennis Freight Lines, Inc., Middlewest Motor Freight Bureau, National Freight Claim Council of American Trucking Associations, Inc., National Motor Freight Traffic Association, Inc., Roadway Express, Inc., Rocky Mountain Motor Tariff Bureau, Inc., Reisch Trucking and Transportation Company, Inc., Southern Motor Carriers Rate Conference, Inc., and Southern Railway Company.

By order dated June 12, 1974, the Commission directed that the matter be handled under the modified procedure. On November 4, 1974, the proceeding was assigned to an Administrative Law Judge for an initial decision. An initial decision was rendered on December 12, 1974. Exceptions to the initial decision were filed by petitioner and by a respondent, Southern Motor Carriers Rate Conference, Inc., to which replies were filed by various parties.

Review Board No. 4, in a report and order on exceptions dated July 3, 1975, reached a different conclusion from that recommended in the initial decision. Petitions for reconsideration were filed by the petitioner, by an intervener in support of petitioner Shippers National Freight Claim Council and by respondents Freight Forwarders Conference, National Freight Claim Council of American Trucking Associations, Inc., National Motor Freight Traffic Association, Inc., Middlewest Motor Freight Bureau, Rocky Mountain Motor Tariff Bureau, Inc., and Southern Motor Carriers Rate Conference, Inc. Replies were filed by the petitioner and by certain respondents.

Positions of the Parties

The petitioner has 128 members. Its membership includes a majority of the manufacturers of drugs, medicines, and toilet preparations in the United States, which represents

most of the tonnage shipped by that industry. Much of this traffic moves via motor common carriage at ratings subject to released valuation liability pursuant to Released Rates Order No. MC-342.

As an illustration of the alleged ambiguity, petitioner posed a hypothetical example of a shipment consisting of 200 bottles of drugs. Each bottle weighs 5 pounds and has a value of $10. The bottles are packaged 10 to a case, and they are shipped under a released rate provision of 50 cents per pound for each article. Petitioner points out that if five bottles in one case are lost or damaged, three different measures of recovery by shippers are possible under different constructions of the word "article." (1) Carrier A could construe the word "article" to be synonomous [sic] with the term "commodity," meaning the entire shipment of 1,000 pounds of drugs. Carrier A then calculates the maximum liability limitation for the shipment as being $500 (50 cents x 1,000 pounds), which is greater than the full value of the bottles involved in the partial loss of $50 ($5 x 10 bottles). As a result, carrier A pays the claim for the full amount of the partial loss of $50. (2) Carrier B construes the word "article" to mean the packaging case, and the liability limitation, therefore, is $25 (50 cents x 50 pounds). Carrier B, accordingly, honors a claim for $25. (3) Carrier C construes the word "article" to mean the smallest unit in the shipment which can be separately identified, the bottle, and calculates the liability limitation to be $2.50 (50 cents x 5 pounds) for each bottle lost. Because five bottles are lost carrier C honors a claim for $12.50. Petitioner favors the interpretation of carrier A, as set forth in the above hypothetical example, and the respondents support the interpretation of carrier C. No party argued that the interpretation of carrier B is proper.

All parties agree that if a released-rates shipment is totally lost or destroyed, the carrier is liable to the shipper on the basis of the maximum liability limitation for the shipment, which in the above example would amount to $500. The issue posed by petitioner in this proceeding concerns only partial loss or damage to such shipment. Under the interpretation of carrier A, the carrier would be subject to the greatest liability. Under the interpretation of carrier C, the carrier would be subject to the lowest liability.

Respondents argue that "article" as used in the Released Rates Order No. MC-342 means the smallest identifiabe [sic] unit of a shipment. They submit the testimony of more than 50 members of the National Freight Claim Council of the American Trucking Associations, Inc. These witnesses testify that they have paid claims only on the basis of 50 cents per pound times the weight of identifiable individual units of the commodity shipped which have been lost or damaged and not on the basis of the other suggested alternatives.

Petitioner, to the contrary, submits documentary evidence consisting of claims for damages filed by shippers on either a per-packing-case basis or on the basis of total shipment weight. Furthermore, some of the receipted claims show that they were settled on the latter basis. Five of the carriers against whom such claims were filed are respondents in this proceeding. Specifically:

> *Dow Chemical Company* submitted three claim statements. All three claims were filed on released valuation based on the total shipment weight. The first claim, dated June 28, 1974, was made to Holland Motor Express, Inc., on a shipment from Fort Wayne, Ind. to Louisville, Ky., consigned to Gould, Inc.
>
> The second claim, dated August 23, 1974, was made to A.P.A. Transport on a shipment from Englewood to Rahway, N.J., consigned to James Wholesale Drug Co.
>
> The third claim, dated July 15, 1974, was made to Georgia Highway Express, Inc., on a shipment from Norcross, Ga. to Jacksonville, Fla., consigned to Lawrence Pharmacy.

Merrill-National Laboratories submitted a claim dated February 14, 1974, to Central Freight Lines on a shipment from Dallas to Victoria, Tex., consigned to Wearden Co. Its claim was filed on a released valuation based on the packing case weight. A copy of a certified check in payment of the claim was also submitted.

Pfizer, Inc., submitted a claim statement dated March 19, 1973, to Briggs Transportation Co. on a shipment from Chicago, Ill., to Janesville, Wis., consigned to Elain Supply Co. Its claim was filed on a released valuation based on the packing case weight.

Whitehall Laboratories, division of American Home Products Corporation, submitted a claim statement to Graves Truck Line dated June 6, 1974, on a shipment from Lenexa, Kans., to Pratt, Kans., consigned to Gibson Products. Its claim was filed on released valuation based on the shipment weight. A remittance voucher in satisfaction of the claim is also submitted. Furthermore, Whitehall asserts that it filed its claims based on the shipment weight with a number of other carriers, including Southwestern Transportation Co., Associated Transport, Inc., Merchants Fast Motor Lines, Mussbaum Trucking, Inc., and Gateway Transportation Co., Inc.

The petitioner argues that to properly interpret the word "article" it is necessary to refer to the released-rates application, the released-rates order entered pursuant to the application, and the National Motor Freight Classification. According to petitioner, in all three of these documents, the word "article" is used synonymously with the word "commodity." In the first four pages of the carriers' original Released Rates Application No. MC-525, commodities were listed under the heading of "articles" for which released ratings and limited liability were sought. Included in that list were "Drugs," "Toilet Preparations," and a number of

other commodities. Immediately under the articles list appeared the precise wording here under consideration:

> The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding 50 cents per pound for each article.

Moreover, the resulting Released Rates Order No. MC-342 authorizes the establishment of released ratings on the "articles described in the said application"; refers also to "drugs, medicines, toilet preparations and other articles described in the Released Rates Application No. MC-525"; and states that "the commodity description may not be broadened to embrace other commodities or articles * * * without specific authority of the Commission." In the ratings published in the National Motor Freight Classification pursuant to this application and order, drugs, chemicals, medicines, toilet preparations, and other commodities are listed under the heading of "Articles."

Petitioner states that limitations of liability in connection with released rates are authorized to protect a carrier from catastrophic loss, setting a maximum limit on any possible loss. Limited liability is authorized by the Commission as an exception to the full liability of common carriers, and such exceptions to an otherwise broad rule of absolute liability must be strictly construed against the carriers.

In support of their position, respondents state that until about a year ago most shippers either initially submitted their claims based upon multiplication of the weight of goods actually lost or damaged by 50 cents per pound or would voluntarily agree to amend their claims to that basis. Respondents believe that a carrier reduces its rates per pound in exchange for a reduced liability per pound or on the basis of a *quid pro quo.*

Respondents read the released-rates application as clearly stating the carriers' liability on a per-pound basis and claim

that petitioner's interpretation could lead to unjust discrimination because partial loss or damage to a small shipment could conceivably result in a different amount of recovery as the same partial loss or damage in a large shipment, when the maximum liability limitation varies with the size of the shipment. According to respondents, it is a judicially recognized principle that the declared valuation, when a partial loss is involved, fixes a ratio per pound times the weight of the individual unit or units of the commodity which are actually lost or damaged and is not based on the full value of the partial loss or damage up to the maximum limit of liability for the entire shipment. *Metals or Metal Alloys,* 311 I.C.C. 617, 621 (1960); *Goldstein & Leavy, Inc.,* v. *Arrow Carrier Corp.,* 53 M.C.C. 9, 14 (1951); *Adeline Apparel Shops, Inc.,* v. *Savage Truck Lines, Inc.,* 63 M.C.C. 369 (1955); *Western Transit Co.* v. *Leslie and Co.,* 242 U.S. 448 (1917); *White* v. *Southern Ry. Co.,* 38 S.E. 2d 111 (S.C. 1946).

Respondents do concede that certain released-rates orders have authorized recovery on the basis of the full value of the partial loss or damage up to the maximum limit of liability for the entire shipment. However, they note that such a basis is always reflected in an express provision in such orders.[1]

Initial Decision and Exceptions

The Administrative Law Judge concluded in his initial decision that the limitation of liability under consideration

[1] This situation is reflected in the former tariffs of Railway Express Co.:

> "Based upon property declared to be of, or released to, a value not exceeding $50.00 for any shipment of 100 pounds or less * * *"

and in the tariffs of United Parcel Service:

> "Released to a value not exceeding $100 per package or article not enclosed in a package."

applies to each and every portion of the shipment moving under the released rates published in compliance with Released Rates Order No. MC-342. He stated:

> For drugs, this means that computation of damages is made on the smallest unit, that is, on the number of bottles lost, damaged, or destroyed. This is the traditional application of the principle approved by the United States Supreme Court that the declared valuation fixes not an arbitrary limit of recovery but a ratio when partial loss is involved. *Western Transit Co.* v. *Leslie and Co.,* 242 U.S. 448 (1917). This means that recovery follows the method used for Carrier C in petitioner's illustration. Compensation for loss must be computed by multiplying the weight of goods actually lost or damaged by 50 cents per pound. * * * See *Metal or Metal Alloys,* 311 I.C.C. 617 (1960); *Goldstein & Leavy, Inc.* v. *Arrow Carrier Corp.,* 53 M.C.C. 9 (1951); and *Adeline Apparel Shops, Inc.* v. *Savage Truck Lines, Inc.,* 63 M.C.C. 369 (1955).

Thereafter, exceptions[2] were filed to the initial decision by petitioner Drug and Toilet Preparation Traffic Conference. Petitioner alleged that the Administrative Law Judge made certain errors of law and of fact in deciding that the proper method for determining damages in petitioner's hypothetical example was the method used by carrier C and therefore construing "per article" as meaning the smallest

[2] Intervener Southern Motor Carriers Rate Conference, on behalf of respondents, filed exceptions requesting modification of the first two paragraphs of the "Findings and Order" section of the initial decision, alleging that it contained an inadvertent error inaccurately reflecting the conclusion clearly intended by the Administrative Law Judge. The review board found that this exception was not germane because the board was not adopting the Administrative Law Judge's findings. For the same reason, on petition, it will not be further considered.

unit which can be identified in a shipment. Petitioner contended that the Administrative Law Judge erred in relying primarily on the *Western Transit* case, *supra*, which was based on a liability limitation of "per net ton." Because of the difference in terminology, petitioner alleged that the limitation under consideration in *Western Transit* had a different meaning than the liability limitation here under consideration of "per pound for each article."

According to petitioner, the Administrative Law Judge also erred by considering out of context the liability limitation authorized by Released Rates Order No. MC-342 and published in the National Motor Freight Classification, which were based on Released Rates Application No. MC-525. The plain meaning of the words "article" and "articles" in the application is said to be the commodity description of the commodities listed therein. In support, petitioner further argues that:

> • • • a valuation limitation can be set alternatively on any of these three bases, so long as the wording so states:
>
> 1. Per pound; or
>
> 2. Per pound at the weight of each case or other shipping container; or
>
> 3. Per pound at the weight of the released valuation commodity in the shipment (usually the same as the shipment weight).
>
> The significance of this is that the use of the words "per pound" in a liability limitation clause by no means foreordains the meaning of the entire clause. All the words must be considered in interpreting the clause. Otherwise, clauses such as: "50 cents per pound per case"; "50 cents per pound per shipment"; and "50 cents per pound per article", would all mean the same things as merely "50 cents per lb." • • •

Moreover, petitioner contended that if the liability limitation in question had been "per pound for each shipment" instead of "per pound for each article," the Administrative Law Judge would have recognized a factual distinction and not selected carrier C's method of computing liability as correct. However, according to petitioner, it was impractical to use the wording "for each shipment" in connection with these commodities for certain reasons:

> • • • (1) a released rated commodity is often shipped as part of a mixed shipment with other non-released commodities, so it is only proper to make the limitation on the basis of the weight of the released article (commodity), since applying the weight of the entire shipment would expand the carrier's liability improperly; and (2) where several released rated articles are shipped together in one shipment there is set a maximum limitation of "50 cents per pound for each article", rather than expanding the carrier's liability for partial loss to the entire weight of all articles in the shipment.

Finally, according to petitioner, the Administrative Law Judge failed to realize that there was in fact no actual rate reduction involved in this matter, apparently relying on respondent-carriers' recurrent claim that the liability limitation must be computed on a pro rata basis because the rate reduction given shippers applied to each pound of freight. Petitioner stated that:

> The other point is the recurrent use of the word "rate concession", in the sense that the shipper using released rates has received such a boon in the form of lower (than full valuation) rates that he must be nailed to the wall with the most minimal recovery if the carrier loses or destroys his property. To begin with, there never was any rate reduction here. These commodities, prior to the released rates order, had moved at the

same classification as now, but at full valuation. At that time, the carriers were considering increasing the classification of drugs, medicines, and toilet preparations and the shippers agreed to this released rates provision to avoid paying higher rates. * * * [3] [Footnote added.]

REVIEW BOARD REPORT AND PETITIONS FOR RECONSIDERATION

In its decision on exceptions Review Board No. 4 concluded that "article" means the case, container, or package. The review board stated:

> We find the phrase "for each article", as used in the National Motor Freight Classification and published pursuant to the authority granted in Released Rates Order No. MC-342 permits recovery for loss or damage of commodities moved under ratings published pursuant to that order for the actual value up to, but no more than, the released value per pound multiplied by the weight of the container or case; that it does not permit recovery for the actual value up to, but no more than, the released value per pound multiplied by the weight of the entire shipment; and that it is not restricted to the actual value up to, but no more than, the released value per pound multiplied by the weight of the individual units of the commodity lost or damaged.

The review board recognized that, in common usage, "article" is applied to almost every substance or material, whether as a member of a class (generic context) or as a particular substance or commodity and that the Commis-

[3] Apparently, some drugs and related articles were classified at full value ratings as class 70, less-than-truckload, and class 40, truckload, prior to the effective date of the released ratings on November 13, 1952. However, generally drugs and related articles were, prior to that date, rated at class 85 less-than-truckload and class 50, truckload.

sion has used the word with both meanings in the same proceeding. The review board concluded that consideration of the particular context of the released rates application and order was necessary to interpret accurately the particular meaning of the tariff in dispute. The review board's ultimate conclusion that "article" means the package, case, or container rested primarily on *Carter* v. *Wilmington & W.R .Co.*, 36 S.E. 14, 15 (1900), and the Commission's "Summary of Information for Shippers of Household Goods," Form BOp-103, 49 CFR § 1003.1. In *Carter,* the supreme court of North Carolina applied the usual and primary meaning of the word "article" and found that each head in a shipment of cattle was one article for purposes of the State statute there under consideration. On the other hand, the court indicated that each nail in a keg would not be one article but rather that the keg would constitute the article.

In the Commission's household goods' regulations, 49 CFR § 1003.1, at pages 20-21, upon which the review board also relied, it is stated:

> 1. Protections up to, but not exceeding, 60 cents per pound per article, at no extra cost. * * * If you release your goods on this basis of limited liability, your recovery for any loss or damage will be subject to a maximum of 60 cents times the weight of the article involved. As an example, you may have a used lamp weighing 4 pounds with a current value of $8, purchased 1 year ago for $10. If this lamp is not packed in a container and it is lost or damaged, the mover's liability is limited to $2.40 or 60 cents per pound times 4 pounds. However, if the same lamp is packed in a container, either alone or with a number of other items, the mover's liability is limited to 60 cents per pound times the weight of the container and its contents. Thus, if the total weight of the full containers is 50 pounds, the mover's maximum liability for the contents of the container is $30 (60 cents times 50 pounds).

> The mover will pay a claim for the full current value of the lamp, $8, if that is all that is lost or destroyed. If the entire container is lost, the mover's maximum liability is $30.

Petitioner and respondents filed petitions for reconsideration of Review Board Number 4's decision, generally reiterating their positions in their opening statements and exceptions.

In addition, respondents assert that the Board erred in concluding that the interpretation of the word "article" in the *Carter* case is in any way inconsistent with a conclusion that the article in the hypothetical example is the bottle. However, respondent's argue that the *Carter* case is of little or no precedential value, because it was based on a State statute. Neither do they believe that the review board's reliance on household regulations are determinative, because household goods movements are made at released valuation in the first instance and are then subject to premium charges for any extra value which might be asserted. The shipments in question, according to respondents, move at full, actual value under the normal tariff rates, with the shipper being given an alternative of agreeing to a released valuation and receiving a lower rate. In the case of household goods, carriers perform the packing and crating, whereas the motor carriers of general commodities have no control over the packaging of the shipments or composition of individual cases.

Petitioner agrees that the *Carter* case and Commission's decisions or regulations concerning household goods are not determinative of this proceeding.

Both parties note that, in the household goods context, the Commission has in its formal decisions and in its regulations treated "articles" as the generic commodity description in some instances and as the individual unit of the shipment in other instances and that the review board recognized this fact.

Discussion and Conclusions

An interpretation of the phrase "for each article" is essential to a determination of the carriers' liability for loss and damage to shipments moving under the released-rates provision for drugs and related articles. As set forth in the examples presented by petitioner, several meanings may be given to the word "article," each of which can muster some support from precedent, but none of which is conclusively applicable to the released rates item in controversy here. Accordingly, we will adopt a meaning for the word "article" which best comports with the history and purpose of released rates.

> That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. * * * The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable and just agreement which did not include exemption against the negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported. *Adams Express Co.* v. *Croninger,* 226 U.S. 491, 509 (1913).

These common law rights, as interpreted by the courts, were codified as section 20(11) of the act, 49 U.S.C. 20(11), made applicable to motor carriers by section 219 of the act, 49 U.S.C. 319.

The valuation of the property transported is not meant to set an absolute limit of liability but rather a ratio of loss

to recovery by the shipper. *Western Transit Co.* v. *Leslie & Co., supra,* at 454. If "article" were defined to mean the entire shipment, the released valuation would set only a maximum limit of liability, a shipper would recoup full value for all loss up to the maximum limit. This result is clearly at odds with the *Western Transit* case, *supra.*

"The purpose of the Act to prevent discrimination has been emphasized by [the Supreme Court] and is well known." *Chicago & N. W. Ry.* v. *Lindell,* 281 U.S. 14, 16 (1930). Discrimination in the form of disparate payments to shippers for loss and damage has been long recognized and is equally repugnant to the act as discriminatory charges in the first instance. *Id.* at 17-18. An interpretation of "article" to mean other than the smallest identifiable unit in a shipment, as contended by respondents, would give rise to the possibility of discrimination.

Suppose shipper A has a mixed shipment of drugs ranging in value from $1 per bottle to $50 per bottle. The hypothetical shipment consists of 5 cases, weighing 100 pounds each. Shipper B also has a mixed shipment of drugs ranging in value from $1 per bottle to $50 per bottle, except that shipper B's shipment consists of 10 cases of 50 pounds each. Suppose further that each shipment is moved subject to a liability limitation of 50 cents per pound for each article.

If a $50 bottle is damaged in each shipment, compensation to shipper A would be different from shipper B if liability is determined on a packing case basis. Shipper A would recover the full value of his loss (50 cents/pound x 100 pounds = $50), while shipper B would recover only one-half of his loss (50 cents/pound x 50 pounds = $25). The only way to remedy this potential disparity is to define "article" to mean the smallest identifiable unit in a shipment.

We remind all parties that our decision is strictly limited to defining the phrase "for each article" in connection with the publication of released ratings on drugs and related

commodities, pursuant to authority granted in Released Rates Order No. MC-342. Further, we admonish respondents to take greater care to use unambiguous terms in released-rates tariffs in the future.

We find that the term "article" in the phrase "not exceeding 50 cents per pound for each article" means the smallest identifiable unit in a shipment of drugs or related articles.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER HARDIN dissents.

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission, Division 2, Acting as an Appellate Division.

ROBERT L. OSWALD,
Secretary.

(SEAL)

STATUTORY PROVISIONS

Interstate Commerce Act:

49 U.S.C. § 10730:

The Interstate Commerce Commission may require or authorize a carrier providing transportation or service subject to its jurisdiction under subchapter I, II, or IV of chapter 105 of this title, to establish rates for transportation of property under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper, or by a written agreement, when that value would be reasonable under the circumstances surrounding the tansportation. A rate may be made applicable under this section to livestock only if the livestock is valuable chiefly for breeding, racing, show purposes, or other special uses. A tariff filed with the Commission under subchapter IV of this chapter shall refer specifically to the action of the Commission under this section.

49 U.S.C. § 11707:

(a)(1) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II, or IV are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the

property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and applies to property reconsigned or diverted under a tariff filed under subchapter IV of chapter 107 of this title. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

(2) A freight forwarder is both the receiving and delivering carrier. When a freight forwarder provides service subject to this subtitle and uses a motor common carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title to receive property from a consignor, the motor common carrier may execute the bill of lading or shipping receipt for the freight forwarder with its consent. With the consent of the freight forwarder, a motor common carrier may deliver property for a freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder's delivery receipt.

(b) The carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury

occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c)(1) A common carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, rule, or tariff filed with the Commission in violation of this section is void.

(2) If loss or injury to property occurs while it is in the custody of a water carrier, the liability of that carrier is determined by its bill of lading and the law applicable to water transportation. The liability of the initial or delivering carrier is the same as the liability of the water carrier.

(3) A common carrier of passengers may limit its liability under its passenger rate for loss or injury of baggage carried on passenger trains, boats, or motor vehicles, or on trains, or boats, or motor vehicles carrying passengers.

(4) A common carrier may limit its liability for loss or injury of property transported under section 10730 of this title.

(d) A civil action under this section may be brought against a delivering carrier in a district court of the United States or in a State court. Trial, if the action is brought in a district court of the United States is in a judicial district, and if in a State court, is in a State, through which the defendant carrier operates a railroad or route.

(e) A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date that person receives written notice from the carrier that it has disallowed any part of the claim specified in the notice.

No. 78-1452

In the Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 590 F. 2d 1180. The opinion of the Interstate Commerce Commission (Pet. App. 47a-63a) is reported at 353 I.C.C. 143. The opinion of the Commission on reconsideration (Pet. App. 15a-46a) is reported at 353 I.C.C. 536.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1978. The petition for a writ of certiorari was filed on March 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

QUESTION PRESENTED

Whether the court of appeals applied the proper standard of judicial review in affirming the decision of the Interstate Commerce Commission as "neither arbitrary nor capricious."

STATEMENT

49 U.S.C. 10730 (1978) (formerly Section 20(11) of the Interstate Commerce Act) provides a limited exception to the general statutory and common law rule that a common carrier may not limit or exempt itself from liability to shippers for loss or damage to property transported. Under that section, the carrier may offer reduced rates for the transportation of property where the carrier's liability is limited to a specific value. These are referred to as "released rates" because the shipper, in effect, releases the carrier from liability in excess of the stated amount. Released rates must be expressly authorized by order of the Interstate Commerce Commission.

In 1952 certain motor carriers and their representatives filed an application with the Commission for approval of released rates they wished to offer on an extensive list of commodities (mostly drugs, chemicals, and toilet preparations) (Pet. App. 16a). The limitation on liability was expressed in the application as follows (Pet. App. 43a):

> The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding 50 cents per pound for each article.

The Commission approved the application (Pet. App. 32a-45a) and incorporated the limitation "50 cents per pound for each article" in its order.

The agency proceeding at issue here concerned the proper interpretation of the word "article" in that limitation. Its meaning becomes significant in computing a carrier's liability for *partial* loss or damage to a shipment. As explained in detail in the opinion of the court of appeals (Pet. App. 4a-5a), the amount of the maximum liability varies depending on whether "article" is interpreted as each different commodity shipped (*i.e.*, the entire shipment of the particular commodity), the shipping container containing the lost or damaged portion of the commodity shipped (such as a carton), or the smallest identifiable unit of the lost or damaged commodity shipped (such as a bottle).

The Drug and Toilet Preparation Traffic Conference, a shipper group, petitioned the Commission for a declaratory order interpreting the critical phrase. Following extensive proceedings, the Commission found that the term "article" means "each commodity in a shipment" in the context of the released rates in question (Pet. App. 31a). Thus it concluded that a carrier's maximum liability under the tariff in the case of partial loss or damage would be 50 cents times the number of pounds of the entire shipment of the particular commodity, even if less than the entire shipment was lost or damaged. As the Commission noted, however (Pet. App. 31a), in no case would the carrier's liability be "more than the loss or damage actually sustained."

The court of appeals affirmed (Pet. App. 1a-13a). The court noted that the tariff provision at issue was "apparently unique" (Pet. App. 4a) and concluded that there was "no basis on which to disturb the Commission's decision" (Pet. App. 13a). The court rejected petitioners' "principal contention" that established legal doctrine requires that a carrier's liability

for partial loss or damage under a released rate provision be determined by reference to the smallest unit actually damaged and not the whole shipment (Pet. App. 8a, 13a). The court held that the Commission acted lawfully in construing the ambiguous provision against the carriers that drafted it (Pet. App. 10a-11a) and noted that the result was consistent with the agency's past approval of other released value provisions (Pet. App. 11a). The court also observed that "nothing precludes the carriers from seeking modification of the released value provision or an increase of the rates under the existing provision, to reflect the additional costs imposed on the carriers by the Commission's decision" (Pet. App. 12a).

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

1. The court of appeals affirmed the Commission's decision as "neither arbitrary nor capricious" (Pet. App. 2a). Although petitioners do not challenge the appropriateness of the "arbitrary or capricious" test, which is mandated by the Administrative Procedure Act (5 U.S.C. 706(2)(A)), they nonetheless argue that the court applied an "erroneous standard of review" (Pet. 10). Specifically, they argue that although the court expressly relied on the arbitrary and capricious standard, its further statement that "we cannot say the ICC's action here lacked *rational basis*" (Pet. App. 6a; emphasis added) shows that the court employed a test that was unduly deferential to the agency and properly applicable only to review of rulemaking (Pet. 8). That contention is without merit.

First, this Court has defined the arbitrary and capricious standard in terms of whether the agency's action has a rational basis. In *FCC* v. *National Citizens Comm. For Broadcasting*, 436 U.S. 775, 803 (1978), it stated that agency actions "may be invalidated by a reviewing court under the 'arbitrary and capricious' standard if they are not rational and based on consideration of the relevant factors," and cited for that proposition *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 413-416 (1971), which, like this case, did not involve rulemaking.

Moreover, the court of appeals' approach is consistent with the established principle, noted by the court (Pet. App. 6a), that agency decisions merit particular judicial deference where, as here, they involve an agency's interpretation or clarification of its own order. See, *e.g.*, *Chesapeake & Ohio Ry.* v. *United States*, 571 F. 2d 1190, 1194 (D.C. Cir. 1977). The declaratory order at issue in the instant case amounts to a clarification of the agency's order approving the released rates. That prior order, like the tariff itself, contained the disputed word "article." The order challenged by petitioners here simply clarified what the agency had approved when it authorized use of the released rates; it was thus entitled to special deference. The Commission's determination also merited particular judicial deference because it involved the interpretation of a tariff, an area in which the agency possesses

special expertise. *Indiana Harbor Belt R.R.* v. *United States*, 510 F. 2d 644, 649-650 (7th Cir.), cert. denied, 422 U.S. 1042 (1975).[1]

Finally, whatever formulation of the arbitrary and capricious standard the court of appeals articulated, it correctly upheld the Commission's decision, which simply cannot be characterized as arbitrary, capricious or irrational. Contrary to petitioners' suggestion (Pet. 4-6), there is nothing arbitrary or irrational in the conclusion that carriers intended in the tariff to compute the limit of their liability on the basis of the weight of the entire shipment of a particular commodity. Such a construction is analogous to a fixed monetary ceiling on the carrier's liability to each shipper or passenger (see, *e.g.*, Article 22 of the Warsaw Convention, 49 Stat. 3019), and it serves the principal purpose of liability-limiting provisions of providing carriers with some measure of certainty about the extent of their maximum liability per shipment. Indeed, as the court noted (Pet. App. 11a n.20), some carriers had given the provision just that construction. Moreover, petitioners do not deny that there is ambiguity in the term "article" that the carriers

[1]Petitioners contend (Pet. 8-9) that the Commission's interpretation of the measure of damages provision in the tariff should be given less deference because the courts have exclusive jurisdiction to adjudicate claims against motor carriers for damages to goods shipped. Whatever quantum of deference is appropriate in the case of ordinary tariffs, petitioners' argument is inapposite here. Unlike other types of tariffs, released rates cannot go into effect unless they have been expressly authorized by the Commission. Since the tariff at issue was effective only by virtue of having been approved by the Commission, the agency was uniquely qualified to explain what disputed terms in the tariff meant.

drafted and filed, and, as the court of appeals pointed out, carriers are free to seek modification of the tariff provision or an increase in their released rates.

2. The cases relied on by petitioners are inapposite. *Western Transit Co.* v. *Leslie & Co.*, 242 U.S. 448 (1917), did not, as the Commission and court of appeals noted (Pet. App. 9a, 26a-27a), involve a limitation provision containing any ambigious term about the measure of liability; it simply provided that the carrier's liability for lost or damaged commodities was to be measured on the basis of a "value not to exceed $100 per ton."

Petitioners also rely on *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), and *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), for their contention that the Commission's interpretations of tariffs are entitled to less deference than agency rulemaking. Those cases, however, involved agency interpretations of statutes concerning which the agency had no rulemaking authority (compare *General Electric*, 429 U.S. at 141; with *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978)) and have no application here, where the Commission's order interprets not a statute but an arcane released rate provision and the agency's prior order authorizing its use—matters on which the Commission has unique experitse. In any event, the Commission's order here was sufficiently reasonable that it should be sustained even if some lesser degree of deference were appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1979

DOJ-1979-05

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1452

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,
NATIONAL FREIGHT CLAIM COUNCIL OF
AMERICAN TRUCKING ASSOCIATIONS, INC.
Petitioners

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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DI CESARE - Printing — 331-6101 — Washington, D.C. 20006

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INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Drug and Toilet Preparation Traffic Conference, intervenor in the proceedings below in the United States Court of Appeals for the District of Columbia Circuit, submits that Petitioners raise no special or important issues which warrant review by this Court on a writ of certiorari.

OPINIONS BELOW

Review has here been sought of the decision of the United States Court of Appeals for the District of Columbia Circuit in

National Motor Freight Traffic Ass'n, Inc. v. *ICC*, which has been reported at 590 F.2d 1180 (1978). The slip opinion is reprinted in Petitioners' Appendix at pp. 1a-13a. That opinion affirmed the decision and declaratory order of the Interstate Commerce Commission in *Drug and Toilet Preparation Traffic Conference — Petition for Declaratory Order — Liability Limitation*, 353 I.C.C. 536 (1977), reprinted in Petitioners' Appendix at pp. 15a-46a.

STATUTORY PROVISION

Petitioners include in the appendix to their petition relevant sections from the Interstate Commerce Act as recodified and revised pursuant to Public Law 94-473, 92 Stat. 1337 (1978). Though substantially unchanged, the new provisions do not contain all the language of the old provisions discussed by the Interstate Commerce Commission in its declaratory order and by the Court of Appeals on review. For convenience, Section 20(11) is reprinted in the Appendix to this brief. Section 20(11) was made applicable to motor carriers by Section 219 of the Act, 49 U.S.C. Section 319, which is also reprinted.

QUESTION PRESENTED

Did the court below err in applying the "arbitrary and capricious" standard in its review of an order of the Interstate Commerce Commission interpreting one of the Commission's own orders?

STATEMENT OF THE CASE

Section 20(11) of the Interstate Commerce Act codified the common law rule that common carriers are fully liable for loss or damage to freight caused by them in the course of transportation.

It declared unlawful and void attempts by carriers to limit that liability. The section includes an exception to this rule of full liability for shipments made at ICC-ordered rates which declare therein a "released" value for the property. Two things are necessary before carriers may lawfully limit their liability: an order by the ICC designating a released valuation limit and a written indication by the shipper assenting to the released valuation. In such a case, carrier liability is limited to an amount not exceeding that "released" value.[1]

In 1952, the carriers applied for an order authorizing such an arrangement for shipments of drugs, medicines, toilet preparations and similar "articles" (*i.e.*, commodities listed in the carriers' application). The released value requested for such shipments was "50 cents per pound for each article" shipped.

The Commission granted the relief requested in the carriers' application by issuing its Released Rates Order No. MC-342, on

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[1]The relevant language from Section 20(11) reads as follows:

> [T]he provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply *** to property *** concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released *** and the Commission is hereby empowered to make such orders in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation.

August 13, 1952, which adopted and prescribed "the released value of the property, as specified in the said applications"[2]. The released valuation so adopted was specified in the carriers' application as follows:

> The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding 50 cents per pound for each article.

This provision was duly published in carrier tariffs and, on numerous shipments over the years, the shippers have tendered shipments on bills of lading showing the language quoted above.[3]

While everyone agrees that, in the event of total loss of a shipment, the released valuation limit is set at 50 cents multiplied by the weight of the commodity shipped, a dispute arose as to how the valuation limit applies in situations where only a part of the shipment is lost or damaged. Rather than bringing individual loss and damage suits in court, where the court would have been required to refer the interpretation issue to the Commission as a matter of primary jurisdiction, this shipper Conference elected to resolve the issue directly by petitioning the Commission for a declaratory order interpreting its released valuation order.

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[2]The Released Rates Applications Nos. MC-524 and 525 and ICC Released Rates Order No. MC-342 were attached as Appendix A to the Commission's declaratory order here at issue, at 353 I.C.C. 548-555, and appear in Petitioners' Appendix at pp. 32a-44a.

[3]Petitioners discuss at length (Petition at pp. 3-4) the tariff items in which these provisions are published, apparently in an effort to suggest that the true wording of the released value is "50 cents per pound". However, the full statement of the released value, "50 cents per pound for each article", does appear in the carrier tariff, and it is this latter formulation, including the clause "for each article" that was adopted by the Commission's order in 1952, including a requirement that such wording be inserted on the bill of lading.

Three different interpretations of this released valuation order were discussed in the Commission proceedings. Under Theory A, "50 cents per pound for each article" means 50 cents per pound times the weight of the commodity in the shipment. Since "article" was used to mean commodity throughout the carrier applications seeking the released valuation order in the 1952 proceeding, "article" is read as meaning "commodity" in measuring damages in cases of partial loss.[4] Under Theory B, "50 cents per pound for each article" means 50 cents per pound times the weight of each damaged case or carton in the shipment. Though there is no support in the Commission's 1952 order or in the carriers' applications for this reading, it is not unusual for other released value provisions to be stated on a per case or carton basis.

Under Theory C, "50 cents per pound for each article" was argued to mean 50 cents per pound times the weight of each damaged bottle or item in the shipment. Here, again, there is no support for this reading in the Commission's 1952 order or in the carriers' applications. But a number of other released valuation orders which limit liability to, *e.g.*, "50 cents per pound", and do not include the "for each article" language, have been read as being based on the weight of only the damaged portion of the shipment.

The effect of these various interpretations is illustrated in the Court's opinion below (590 F.2d at 1183, Petitioners' Appendix at pp. 4a-5a) by applying each of them to a hypothetical shipment. The illustration used by Petitioners at page 5 of their Petition is incomplete, since it omits any discussion of Theory B. Petitioners go on to characterize as anomalous the possibility that, under Theory A, a shipper could recover his actual damages. However, this result is also possible under Theory B. Further, the carriers' argument is that they are entitled to a whole

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[4]See the Commission's discussion of this usage at 353 I.C.C. 542, Petitioners' Appendix pp. 23a-24a.

series of released valuation limits, one for the whole shipment and an infinite series of valuations dependent on the weight of each lost and damaged portion. There is nothing in the statute which suggests that more than one valuation limit for each shipment is required or that the valuation limit be different in the case of a partial loss.

In any event, after extensive analysis of the issues and of the evidence of the various parties, the Commission issued a declaratory order holding Theory A correct.[5] In so doing, it found that the word "article" had been used consistently throughout the carriers' application in 1952 as synonomous with "commodity". The carriers appealed, and on December 20, 1978 the United States Court of Appeals for the District of Columbia affirmed the Commission's order.[6] It is that decision which Petitioners challenge.

REASONS FOR DENYING THE WRIT

In support of their contention that a writ of certiorari should issue, Petitioners make two contentions: first, that the Court of Appeals should not have applied the arbitrary and capricious test of the Administrative Procedure Act in its review of the Commission's declaratory order; and, second, that the interpretation of the released valuation order adopted by the Commission is in conflict with a decision of the Court interpreting a differently worded released valuation limitation many years ago. Both contentions are without merit.

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[5] *Drug and Toilet Preparation Traffic Conference - Petition for Declaratory Order - Liability Limitation*, 353 I.C.C. 536 (1977) Petitioners' Appendix pp. 15a—46a.

[6] *National Motor Freight Traffic Assn., Inc. v. I.C.C.*, 590 F. 2d 1180 (D.C. Cir. 1978).

I.

THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW

Petitioners' challenge to the test employed by the Court of Appeals in reviewing the Commission's order proceeds from a number of misconceptions. The first thing to be understood about Petitioners' threshold point — that the Commission's order is an "interpretative guideline" rather than a "legislative rule" and, as such, entitled only to limited judicial deference — is that this contention appears for the first time in their petition for a writ of certiorari. Not only did Petitioners fail to argue this "interpretative rule" theory before the Court of Appeals, but the Argument section of their March 20, 1978 brief in that court began (at page 14) with the heading: "The Commission's Order is Arbitrary and Capricious." Petitioners should not now be heard to challenge a standard of review they themselves argued was proper in the court below. See *United States* v. *Fleishman*, 339 U.S. 349, 365 (1950).

Even if this Court were now to consider *de novo* this argument of Petitioners, certiorari would still not be warranted. This is because the argument is wrong — the standard applied by the Court of Appeals was correct — and, furthermore, the standard now advocated by Petitioners would not produce a different result.

At pages 6-7 of their Petition, Petitioners cite Professor Davis' Administrative Law Treatise (1978 Supplement, at pp. 257-258) for the proposition that agency findings are not binding on courts "when Congress has not delegated to an agency the power to make law through rules". What Petitioners would overlook or obscure is that Section 20(11) is a specific delegation of legislative authority. Indeed, Section 20(11) does not just allow the Commission to issue orders, it requires that it do so. Only where a carrier acts pursuant to a specific Commission order

issued under Section 20(11) may it limit its liability. What the Commission was doing here was interpreting its own order which it had issued in 1952. It is beyond cavil that the 1952 order was a legislative rule, inasmuch as the Commission entered a released valuation order pursuant to the express direction of Congress in Section 20(11). The Commission now employed the declaratory order procedure, which it was entitled to use under Section 5 of the Administrative Procedure (5 U.S.C. Section 554(e) "with like effect as in the case of other orders", to clarify or interpret its earlier released rates order. In effect, it was simply amplifying its 1952 order to make it clearer; and in so doing was exercising precisely the same legislative authority it had performed under Section 20(11) in initially issuing the order in 1952.

The Commission's order does not resemble the "guidelines" discussed by this Court in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), and in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), the cases on which Petitioners rely for support of their argument. In the first place, those cases involved *guidelines*, promulgated informally, without Congressional authority. In the second place, in neither instance was the Court being asked to review an agency decision in the case at hand. Instead, the Court was considering what collateral effect such general pronouncements might have in disputes between private parties. The guidelines themselves were not before the court for review.

Here, in contrast, the ICC issued an *order* (not a guideline or interpretative bulletin) which is the product of lengthy adversary proceedings arising out of statutory authority over released value limitations on carrier liability. The parties now before this Court — Petitioners National Motor Freight Traffic Association and National Freight Claim Council and Respondent Drug and Toilet Preparation Traffic Conference — fully developed the record before the Commission, consisting of written testimony, extensive exhibits and briefs. Thus, rather than being in the nature of some sort of staff guideline issued *sua sponte*, this was the typical litigated administrative proceeding, as Petitioners

recognized when they followed the classic appellate route of filing an appeal to the Court of Appeals from an administrative agency's decision.

Thus, it is entirely proper that the Court of Appeals considered the Commission's determination entitled to deference[7] The Court of Appeals here, unlike the courts in *Skidmore* v. *Swift & Co.* and *General Electric Co.* v. *Gilbert, supra*, had agency "actions, findings and conclusions" directly before it. Under Section 10 of the APA (5 U.S.C. Section 706(a)(A)) the arbitrary and capricious standard of review was correct.

II.

PETITIONERS' SUBSTANTIVE ARGUMENTS ARE WITHOUT MERIT

Petitioners proceed from the discussion of the assertedly excessive deference given the Commission by the Court of Appeals to a discussion of asserted defects in the Commission's decision (which they say went uncorrected by the court as a result of its reluctance to substitute its judgment for the Commission's)[8].

[7]See, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), as to orders, and *United States* v. *North Carolina Granite Corp.*, 288 F. 2d 232, 235 (4th Cir. 1961) as to tariff construction.

[8]Petitioners also make reference (Petition at 10-11) to three class actions now pending against a number of carriers, which grew out of the Commission's interpretation of the carriers' limitation of liability. Throughout the instant litigation, this Respondent has taken the position that the carriers preference for Theory C, which minimizes their liability, was self-serving and unsupported by any evidence. The Commission agreed, and the Court of Appeals affirmed the Commission. These decisions notwithstanding, the nation's carriers continue, *to this day*, to pay shipper loss and damage claims under Theory C. It was to recover the valuation found just by the Commission, but unlawfully withheld by carriers while time-consuming avenues of appeal have been followed by the carriers, that those three class actions were filed.

The asserted defect on which Petitioners place most weight — an alleged conflict between the Commission's order and this Court's decision in *Western Transit Co.* v. *Leslie & Co.*, 242 U.S. 448 (1917) — is based on a fiction. The Court of Appeals did not, as Petitioners imply, defer to the Commission to the extent of allowing it to overrule a decision of this Court. It simply found no conflict. That being the case, it is nonsense to suggest that a different standard of review would have produced a different outcome.

Petitioners say (at p. 11) that the Commission's decision conflicts with the "ratio method of determining damages determined by this Court in the *Western* case." There is no "ratio method of establishing damages." The Court in *Western Transit* found that the released value used in that case — "$100 per net ton" — should not be read as setting a valuation limit based on the entire weight of the shipment. As the Court of Appeals properly observed in the instant case:

> *Western Transit* must be read in the light of the limitation provision there involved — one with no language even arguably pointing to a whole shipment standard. Here, there was the additional element of the phrase "for each article". The Commission was therefore presented with a question of interpretation not raised by the less ambiguous terms of the *Western Transit* provision. 590 F.2d at 1185, Petitioners' Appendix at p. 2a.

Petitioners' other assignments of error — two assertedly "fatal defects" in the Commission's decision discussed at pp. 12-13 of their Petition — are equally baseless.

First, Petitioners for the first time attempt to argue that the correct statement of the released value in dispute here is "50 cents per pound", not "50 cents per pound for each article." Here, again, they have raised an argument before this Court that was

not raised before the Commission or the Court of Appeals and, therefore, should not be considered by this Court. Throughout this entire litigation all parties have always focused upon the issue of the significance of the words "for each article". Having lost their argument on that issue before the Commission and the Court of Appeals, they would now fashion an argument to the effect that these words are not really a part of the released valuation.

In any event, the allegation is groundless. Section 20(11) clearly states that the carriers' liability is limited "to an amount not exceeding the value....declared or agreed to" by the shipper. The value declared or agreed to by the shipper is 50 cents per pound for each article, the valuation that appears on the bill of lading. That same valuation was proffered in the carriers' application and was adopted by the Commission in its order in 1952. It is this value, then, that established the upper limit of carrier liability.

Next, Petitioners state that the Commission failed to give any positive reason why the phrase "for each article" means that damages are to be measured by the weight in the shipment of the damaged commodity. This is simply not true. The Commission's decision gives a number of positive reasons for its interpretation of the phrase "for each article". They are summarized in the following paragraph:

> In adopting a construction of the word "article" as used in our 1952 order in No. MC-342 and in related items of the National Motor Freight Classification, we have given consideration to the circumstances surrounding the transportation of the property involved, including the context in which the word was used in the application to which the order responds, the language used in exceptions and commodity tariffs naming released rates on the same list of commodities, and the possible impact of such a construction upon the carriers and members of the shipping public.

CONCLUSION

For the foregoing reasons, Petitioners' request for a writ of certiorari should be denied.

Respectfully submitted,

DRUG AND TOILET
PREPARATION TRAFFIC
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APPENDIX

Section 20, par. (11) (49 U.S.C. § 20(11)) Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim.

Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transporatation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transporatation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading,

notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filled with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided,* That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tarifff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary

livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further,* That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided further,* That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the linehaul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further,* That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided.

Section 219 (49 U.S.C. § 319) Application of section 20(11) and (12) of this title to common carriers by motor vehicle.

The provisions of section 20(11) and (12) of this title, together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of those persons to which such provisions are specifically applicable.

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REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

INTRODUCTION

Briefs in opposition to the petition for a writ of certiorari have been filed by the Department of Justice and the Drug and Toilet Preparation Traffic Conference. This reply brief is filed on behalf of the National Motor Freight Traffic Association, Inc. and National Freight Claim Council of American Trucking Associations, Inc.

REPLY ARGUMENT

Several arguments have been urged in opposition to the petition for a writ of certiorari. First, the Drug and Toilet Preparation Traffic Conference cites *United*

States v. *Fleisman,* 339 U.S. 349, 365 (1950), as support for its contention that petitioners cannot challenge the standard of review employed by the United States Court of Appeals for the District of Columbia Circuit.[1] The *Fleisman* case is easily distinguished. Here, petitioners' challenge is directed to the action of the Court of Appeals itself, namely, that the Court of Appeals applied an incorrect standard of review. This occurred when the Court of Appeals applied a "rational basis" standard of review citing its own decision in *Ethyl Corp.* v. *EPA,* 541 F.2d 1, at 34-35 (D.C.C.A. 1976). The question presented is, therefore, reviewable by this Court.[2]

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[1] This argument is not advanced by the government.

[2] See *Issue Not Raised—Supreme Court,* Ernest H. Schopler, 42 L.Ed.2d 946, 968 (1976):

"As ruled by the United States Supreme Court, the court will consider questions passed upon by the courts below, although not, or not properly, raised by the parties in the courts or administrative agency below. Mallett v North Carolina (1901) 181 US 589, 45 L Ed 1015, 21 S Ct 730; Missouri, K. & T. R. Co. v. Elliott (1902) 184 US 530, 46 L Ed 673, 22 S Ct 446; Mutual Life Ins. Co. v McGrew (1903) 188 US 291, 47 L Ed 480, 23 S Ct 375; Leigh v Green (1904) 193 US 79, 48 L Ed. 623, 24 S Ct. 390; Fullerton v Texas (1905) 196 US 192, 49 L Ed 443, 25 S Ct 221; Steigleder v McQuesten (1905) 198 US 141, 49 L Ed 986, 25 S Ct 616; Forbes v State Council of Virginia (1910) 216 US 396, 54 L Ed 534, 30 S Ct 295; Illinois C. R. Co. v Kentucky (1910) 218 US 551, 54 L Ed 1147, 31 S Ct 95; Kentucky Union Co. v Kentucky (1911) 219 US 140, 55 L Ed 137, 31 S Ct 171; Friend v Talcott (1913) 228 US 27, 57 L Ed 718, 33 S Ct 505; Consolidated Turnpike Co. v Norfolk & O. V. R. Co. (1913) 228 US 326, 57 L Ed 857, 33 S Ct 510, reh den 228 US 596, 57 L Ed 982, 33 S Ct 605; Bowe v Scott (1914) 233 US 658, 58 L Ed 1141, 34 S Ct 769; Manhattan Life Ins. Co. v Cohen (1914) 234 US 123, 58 L Ed 1245, 34 S Ct 874; Godchaux Co. v Estopinal (1919) 251 US 179, 64 L Ed 213, 40 S Ct 116; Cumberland Coal Co. v Board of Revision of Tax Assessments (1931) 284 US 23, 76 L Ed 146, 52 S Ct 48; Great N. R. Co. v Sunburst Oil & Refining Co. (1932) 287 US 358, 77 L Ed 360, 53 S Ct 145, 85 ALR 254; Nickey v Mississippi (1934) 292 US 393, 78 L Ed 1323, 54 S Ct 743; Herndon v Georgia (1935) 295 US 441, 79 L Ed 1530, 55 S Ct 794; Raley v Ohio (1959) 360 US 423, 3 L Ed 2d 1344, 79 S Ct 1257; Jones v United States (1960) 362 US 257, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR2d 233; Coleman v Alabama (1964) 377 US 129, 12 L Ed 2d 190, 84 S Ct 1152; Federal Power Com. v Sunray DX Oil Co. (1968) 391 US 9, 20 L Ed 2d 388, 88 S Ct 1526; Dyke v Taylor Implement Mfg. Co. (1968) 391 US 216, 20 L Ed 2d 538, 88 S Ct 1472; Sabbath v United States (1968) 391 US 585, 20 L Ed 2d 828, 88 S Ct 1755; Moragne v States Marine Lines, Inc. (1970) 398 US 375, 26 L Ed 2d 339, 90 S Ct 1772; Ocala Star-Banner Co. v Damron (1971) 401 US 295, 28 L Ed 2d 57, 91 S Ct 628; Pipefitters Local Union v United States (1972) 407 US 385, 33 L Ed 2d 11, 92 S Ct 2247; Ward v Monroeville (1972) 409 US 57, 34 L Ed 2d 267, 93 S Ct 80, 61 Ohio Ops 2d 292; Jenkins v Georgia (1974) 418 US 153, 41 L Ed 2d 642, 94 S Ct 2750. See Boykin v Alabama (1969) 395 US 238, 23 L Ed 2d 274, 89 S Ct 1709, infra § 17[b]."

Petitioners read the government's brief in opposition as accepting the proposition that the agency action under review here is not legislative action.[3] However, citing *FCC* v. *National Citizen Comm. for Broadcasting,* 436 U.S. 775, 803 (1978), and *Citizens of Overton Park* v. *Volpe,* 401 U.S. 402 (1971), the government argues that in this case the arbitrary and capricious standard in the Administrative Procedure Act, 5 U.S.C. § 702(2)(A), is the equivalent of the rational basis test applicable to legislative rulemaking used by the lower court, and that agency action "may be invalidated by a reviewing court under the 'arbitrary and capricious' standard if they are not rational and based on consideration of relevant factors." (Gov. Br., p. 5).

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[3] Intervenor, Drug & Toilet Preparation Traffic Conference, argues that the Commission exercised legislative authority (Intv. Br., p. 8), and therefore, properly applied the rational basis test as cited by the lower court in *Ethyl, supra,* at 34-35. Petitioners have previously addressed this point in their petition for a writ of certiorari and those arguments will not be repeated.

The government's argument points out the error in the lower court's standard of review. The nature of agency action being reviewed dictates what factors are relevant in determining whether the agency action lacks a rational basis. Petitioners submit that the factors to be considered by the Court in determining whether a legislative rule has a rational basis, that is, the test applied by the lower court, are not the same when determining whether an interpretative guideline has a rational basis. The rational basis test for legislative rules used by the lower court accords entirely too much deference to the agency action here under review. The proper standard of review is set forth in *Skidmore* v. *Swift Co.*, 523 U.S. 134 (1944), which standard should have been followed by the Court of Appeals.

The government attempts to distinguish *Skidmore* by arguing that here the Commission is interpreting its own order and that *Skidmore* involved an interpretation of a statute. First of all, the disputed phrase "for each article" interpreted by the Interstate Commerce Commission never appears in the Commission's order in MC-342 (Pet. App. 32a-34a). The disputed phrase appears in the tariff. As pointed out in the petition for a writ of certiorari, a tariff has the force and effect of a statute and courts can and do routinely interpret tariffs as statutes. Taken a step further, the tariff involved here determines the measure of damages and Congress has delegated exclusive jurisdiction to the Courts to award damages under 49 U.S.C. § 10730, formerly 49 U.S.C. § 20(11). Measure of damages is an equitable concept clearly beyond the expertise of the Interstate Commerce Commission.

Lastly, the government argues that whatever standard of review is articulated, the Commission decision cannot be characterized as arbitrary and capricious even if a lesser degree of deference is appropriate (Gov. Br., pp. 6-7). In making this argument the government attempts to distinguish this Court's interpretation of a released value provision in *Western Transit Co.* v. *Leslie & Co.*, 242 U.S. 448 (1917), and in doing so makes the same error made by the Commission and the Court of Appeals.

The statutory requirements that enable a carrier to limit its liability to something less than the actual value of goods is a two-step process. First, carriers must have reduced released value rates approved by the Commission. In this case the reduced released value rates are dependent on a declared value of "50 cents per pound" set forth in Item 60000. However, the carrier cannot limit its liability just because it has approved released value rates on file with the Commission. There is a second step. The shipper must agree in writing that its goods are being shipped at a released value, in this case 50 cents per pound as set forth in Item 60000. The election of the shipper to ship its goods at a released value of 50 cents per pound in exchange for a reduced rate is accomplished by following the instruction in Item 60002. Only Item 60002 contains the phrase "for each article." Neither the Commission nor the Court below has ever explained or even discussed why or how the phrase "for each article" used in the statutory written notification requirement in Item 60002 changes the undisputed meaning of the released value of "50 cents per pound" contained in Item 60000. Hence, for this reason alone, review under the proper standard would dictate a different result.

Wherefore, National Motor Freight Traffic Association, Inc. and National Freight Claim Council of the American Trucking Associations, Inc. request that a Writ of Certiorari be issued in this proceeding.

Respectfully submitted,

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May 14, 1979